163 U.S. 711

TRANSCRIPT OF RECORD.

163-711

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 235.

M. M. WHEELER ET AL., APPELLANTS,

vs.

J. C. CLOYD ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED MAY 17, 1893.

(15,320.)

we shall move the Supreme Court of the United States, at the Court-room thereof, in the City of Washington, that the foregoing petition for a writ of certiorari be granted.

Dated at San Francisco, Calif., this 27th day of March, 1896.

SMITH & MURASKY,
Counsel for Petitioner.

Service of above and receipt of copy thereof hereby admitted at San Francisco, Calif., this day of March, 1896.

Counsel for Champion Mining Company.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. William J. Allen, district judge of said district, and in the absence of the Hon. Walter Q. Gresham and William A. Woods, judges of the seventh judicial circuit, on Tuesday, the 19th day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and seventeenth year.

JAMES C. CLOYD *et al.*
v.
SAMUEL MUNDY, WILLIAM SANDLIN, HENRY T. Garrison, Samuel Garrison, Joseph White, William White, and Martha J. Wheeler, Heirs of Richard White, Deceased; James B. Manahan, William F. Bain, William Shaeffer, E. T. Hall, Elizabeth E. Slover, F. M. Burgess, Adam Osterman, William J. Osterman, and Samuel Sparks, M. M. Wheeler, N. N. Borah, A. Winters, Jas. W. Clary, H. Tucker, John Johnson, H. Tompkins, P. R. King, Heirs of Thos. St. Ledger; Malindia Sanders, L. J. S. Alex. Rider, V. C. Borah, Thos. Beyhamer, Henry Kinkart, J. L. Waggener, John Haffel, Wm. Mabery, Geo. Draper, F. W. Tracy.

In Chancery.
Consolidated Case.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Whereas lately, in the circuit court of the United States for the southern district of Illinois, before you or some of you, in causes between James C. Cloyd, complainant, and Samuel Mundy, William Sandlin, *et al.*, defendants; Chauncey T. Austin, complainant, and Michael Book, William Morris, and Daniel L. M. McCauley, defendants; John B. Cornell, complainant, and Thomas J. Pettyjohn, Jacob C. Williams, *et al.*, defendants; Elizabeth H. Taylor *et al.*, complainants, and Caleb Peddicord, Micajah Dalton, *et al.*, defendants, Fernando B. Hane and Lucinda A. Walker, intervening petitioners, which causes were consolidated, wherein the decree of the said circuit court was entered on the 28th day of January, A. D. 1886, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by M. M. Wheeler, N. N. Borah, A. Winters, William R. Cox, Hiram Tucker, William Mabery, *et al.*, agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas, at the present term of October, A. D. 1889, of said

Supreme Court, the death of John B. Cornell, one of the appellees, having been suggested, it was ordered that Minnie R. S. Cornell, John M. Cornell, and Henry M. Cornell, executors of the said John B. Cornell, deceased, be made parties appellees in this cause;

3 And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

April 7, 1890.

You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the thirty-first day of May, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsed:) Filed June 2nd, 1890. James T. Jones, clerk.

4 UNITED STATES OF AMERICA, } ss:
State of Illinois, }

In Circuit Court United States, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, FERNANDO B. Hane, Lucinda A. Walker, E. H. Taylor, Wm. Balston; F. M. Alexander, Executor Pete McMartin, Deceased; Chas. Coe, C. T. Austin, J. Sargent Smith, Arthur F. Gould, and Joseph Waxelbaum	Consolidated Cases. Reforeclosures of Mortgage.
vs.	
M. M. WHEELER *et al.*	

Motion to Set Aside Decree and Dismiss the Suit for Want of Jurisdiction.

Now comes def'ts, by their att'y, H. Thompkins, and enters this their motion in the above-entitled cause, that the court set aside and render null and void the proceedings and decree had therein and dismiss the suit for want of jurisdiction; that the court had no jurisdiction of the subject-matter nor of the parties.

That the jurisdiction was ambigious and obscure.

That the jurisdiction of the court over the parties and subject-matter was had by fraud and collusion, with false allegation asserted.

That the court was imposed upon in taking jurisdiction in said cause by the fraudulent acts of Fernando B. Hane, Lucinda A. Walker, J. C. Cloyd, nominal complainants, and F. C. Whitney and Walter B. Scates, who appear as their attorneys; that said att'ys were residents and citizens of the State of Ill. with the def'ts; that the att'ys so named were the owners of the subject-matter in dispute at the time and after the suit was commenced; that the said F. C. Whitney and Walter B. Scates, being so the real party in interest, assigned and granted to said F. B. Hane, Lucinda A. Walker, and J. C. Cloyd, without consideration and for the sole purpose — reciting that they were non-residents and citizen- of other States, and that their names as complainants are but nominal and used for the purpose of jurisdiction, without having *or* had any interest in the subject-matter in controversy.

That no complainant had, as against any defendant, either demanded, prayed, or desired an amount in controversy of value to exceed $500; that no amount was alleged as required by law to give jurisdiction; that the amount to give jurisdiction as stated was ambiguous and obscure; and this they are ready to verify. Therefore they pray the judgment of the court will take no further cognizance or sustain the further action.

H. TOMPKINS,
Att'y for Def'ts.

UNITED STATES OF AMERICA, }
State of Ill., } ss:

Now comes H. Tompkin, def't and att'y for def'ts, and, being duly sworn, says that the facts set forth in the above motion are true, according to his information thereof, and that he believes the same will be fully sustained as true on the hearing of this motion.

H. TOMPKIN.

Subscribed & sworn to before me July 7, 1890.

JAMES T. JONES, *Clerk.*

6 STATE OF ILLINOIS, }
Southern Dist., U. S. Court, } ss:

In the Circuit Court United States, Southern Dist. Ill., June Term, 1885.

ELIZABETH W. TAYLOR *et al.* }
vs. } Bill to Reforeclose Mortgage.
J. B. BOZARTH *et al.* }

Now comes the respondents, by their att'ys, James McCartney, R. P. Hanna, and H. Tompkins, files this their motion to dismiss the suit as to all parties claiming or holding title conveyed to them since the commencement of this suit, to wit, Jan., 1882, by Walter B. Scates and H. C. Whitney, and for cause state that H. C. Whitney and Walter B. Scates are and were residents in the Sate, and that the transfer of said title was made above and for the pur

pose that the said parties, to wit, Lucinda Walker, Fernando B. Hane, and J. C. Cloyd, who claim to be non-residents and who now are the real complainants in this cause, received their title from the said H. C. Whitney and Walter B. Scates, it being a quitclaim interest only and without any consideration paid, that they might interven- in this suit and thus deprive the State court of its jurisdiction and the subject-matter of the said lands.

And your respondents further state that the same was so transferred after the supreme court of the State of Ill. had decided that the said title to the said lands so held by the said H. C. Whitney and Walter B. Scates was null and void, in which said causes so heard and adjudicated by the supreme court of the State of Illinois the said H. C. Whitney and Walter B. Scates were parties defendants thereto.

Whereupon your respondents move that this cause be dis-
7 missed.

HANNA & ADAMS,
H. TOMPKIN,
JAMES McCARTNEY,
Att'y- for Def'ts.

STATE OF ILL., }
Sangamon County. }

H. Tompkin, being duly sworn, states that the facts stated in the above motion on information and belief are true.

H. TOMPKIN.

Subscribed and sworn to before me October 3, 1885.
J. A. JONES, *Clerk.*

(Indorsed:) Filed October 3, 1885. J. A. Jones, clerk. Refiled July 7, 1890. James T. Jones, clerk.

8 UNITED STATES OF AMERICA, }
State of Illinois, } *ss:*

In Circuit Court, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, FERNANDO B. HANE, LUCINDA A. WALKER, ELIZABETH H. TAYLOR, *et al.*
vs.
M. M. WHEELER *et al.*
} Consolidated Cases. To Reforeclose Mortgage.

Edwin Beecher.

SIR: Please take notice that on the affidavit, with a copy whereof you are herewith served, attached to this notice, and other proof to sustain the same, a motion will be filed in the above cause in the circuit court of the United States for the southern dist. of Ill., before the judge of the said court, on the 7th day of July, 1890, at 10 o'clock, to be taken up on ten days' notice thereafter, as soon as counsel can be heard, that the court order that the decree in said cause had

therein may be set aside, and that the suit be dismissed at complainants' cost, for the reason, and that the record and facts show, that the court had no jurisdiction.

H. TOMPKIN,
Att'y for Def'ts.

To Hon. E. Beecher, att'y for compl'ts.

UNITED STATES OF AMERICA, }
State of Illinois, } ss:

H. Tompkins, one of the above-named def'ts and as att'y for def'ts, being duly sworn, says that the statement that the record and facts to be produced will show that the court had no jurisdiction.

Sworn to before me this 1st day of July, 1890.

H. TOMPKIN-.

Subscribed & sworn to before me this 2nd day of July, 1890.

[SEAL.] W. H. VANDEWATER, *N. P.*

9 UNITED STATES OF AMERICA, }
State of Ill., } ss:

In Circuit Court of the United States, Southern Dist. of Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, Lucinda A. Walker, Elizabeth H. Taylor, Chas. Coe, J. Sargeant Smith, Arthur F. Gould, H. M. Alexander, C. T. Austin
vs.
M. M. WHEELER *et al.*

Consolidated Cases.
Reforeclosure of Mortgage.

It is hereby admitted that the title of J. C. Cloyd and J. B. Cornell to the lands involved in the above suit, wherein the bills of complaint are filed by Edwin Beecher as their attorney, was derived through the sale by the public administrator of Wayne Co., State of Illinois, to pay debts against the estate of Wm. R. Hodges, deceased, which sale was had on the 24th day of Jan., 1880; that the said Hodges was one of the complainants in the foreclosure suit entitled J. W. Kennicott *et al. vs.* The County of Wayne.

And it is further admitted that the said lands were a part of his, the said Hodges, proportion of the division under the foreclosure suit.

EDWIN BEECHER,
Att'y for J. C. Cloyd and Heirs of J. B. Cornell.

(Indorsed:) Filed July 7, 1890. James T. Jones, clerk.

10 UNITED STATES OF AMERICA, *State of Illinois,* } ss:

In Circuit Court, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, Lucinda A. Walker, Elizabeth H. Taylor, Chas. A. Coe, J. Sargeant Smith, Arthur F. Gould, H. M. Alexander, C. T. Austin, *et al.*
vs.
M. M. WHEELER *et al.*
} Consolidated Cases. To Reforeclose Mortgage.

To E. H. Taylor.

SIR: Please take notice that on the affidavit, with a copy whereof you are herewith served, attached to this notice, and other proof to sustain the same, a motion was filed in the above cause in the circuit court of the United States for the southern dist. of Ill., before the judge of the said court, on the 7th day of July, 1890, at 10 o'clock, to be taken up on the 9th of Sept., 1890, at 2 o'clock p. m., or as soon as counsel can be heard, that the court order that the decree in said cause had therein may be set aside, and that the suit be dismissed at complain-ts' cost, for the reason, and that the record and facts show, that the court had no jurisdiction.

H. TOMPKINS,
Att'y and Sol. for Def'ts.

UNITED STATES OF AMERICA, *State of Illinois,* } ss:

11 H. Tompkins, one of the above-named def'ts and as att'y for def'ts, being duly sworn, says that the statement that the record and facts to be produced will show that the court had no jurisdiction —.

H. TOMPKINS.

Sworn to before me this 1st day of July, 1890.
WM. H. VANDEWATER, *N. P.*

BROOKLYN, MASS.

I hereby certify that I left copy of within with J. B. Stoner, att'y for above complainant.
The 18th of Aug., 1890.

H. TOMPKINS.

(Indorsed:) Filed October 6, 1890. James T. Jones, clerk.

12 UNITED STATES OF AMERICA, *Southern Dist. Ill.*, } *ss:*

In Circuit Court United States, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, LUCINDA A. Walker, Elizabeth H. Taylor, H. M. Alexander, Chas. E. Coe, C. T. Austin, J. Sargeant Smith, Fernando B. Hane, Arthur F. Gould
vs.
M. M. WHEELER *et al.*

Consolidated Cases. Reforeclosure of a Mortgage.

Motion to dismiss suit for want of jurisdiction.

Affidavit.

To FERNANDO B. HANE:

Question. State if you are the Fernando B. Hane whose name is included in the above-named parties as complainant, and, if so, state fully the circumstances and consideration by which you became such party; also whether you had any interest other than a trustee in the subject-matter of such controversy, and have you conveyed the same back to the real parties, and when.

Answer. I am the Fernando B. Hane so named in said suit. The circumstances of my becoming such party was as follows, viz: Walter B. Scates, who lived in Chicago, Ill., wanted some one who lived in another State, or State of Ohio, to whom he could transfer the lands involved in the suit, so that he could institute the suit in the United States court in the State of Illinois, and it was
13 through some of my friends and a promise to pay me and i-demnify me in the matter that I received the deeds of the lands.

The subject-matter of the litigation was for the benefit of Walter B. Scates. After the death of Walter B. Scates, some time in 1886, at the request of the heirs of said Scates, I quitclaimed the said lands back to the heirs. I never had any interest other than above stated in the subject-matter of the suit.

FERNANDO B. HANE. [SEAL.]

Personally appeared before me, Wm. W. Darby, a county clerk of the court of common pleas in and for the county of Williams, State of Ohio, Fernando B. Hane, personally known to me to be the person named, and, after subscribing his name, was duly sworn by me, states that the answer to the above question as written out *are* true.

[SEAL.] WILLIAM W. DORBY, *Clerk.*

Sept. 25, 1890.

(Indorsed:) Filed October 6, 1890. James T. Jones, clerk.

14 UNITED STATES OF AMERICA, *Southern Dist. Ill.*, } ss:

In Circuit Court United States, Southern District Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, FERNANDO B. HANE, *et al.* *vs.* M. M. WHEELER *et al.* } Consolidated Cases. Reforeclosure of Mortgage.

Motion to dismiss suit for want of jurisdiction.

Ex Part- Affidavit of J. C. Hyde on Question Propounded by Def'ts.

Question. State your age, residence, and occupation, and if you are acquainted with Fernando B. Hane, one of the above-named complainants in this cause; and, if so, state the circumstance, if you know, and your means of knowledge, of how he became in any way interested so that his name was used as complainant to the subject-matter in controversy; and, further, was he the real party in interest; if not the real party in interest, state, if you know, who was the real party and your means of knowledge.

My name is James C. Hyde; I am fifty years of age, and reside at 884 Sawyer avenue, in the city of Chicago, State of Illinois, and have been a resident of Chicago for the past twenty-six years. I am a real-estate agent and broker, and have continued in that business for the past twenty years.

15 I do know one Fernando B. Hane, now living in Bixan, Ohio, formerly lived at Canton, Ohio, and have known him since October, 1874. I married his wife's sister in 1875; therefore are brothers-in-law. The circumstances of his name being used in the above-entitled cause is as follows:

In the fall of the year 1883 I made the acquaintance of Judge Walter B. Scates, deceased, and he stated he had some Wayne county lands to sell and wanted me to sell the same for him. I agreed to act as an agent or broker in disposing of the said list of lands he had in Wayne county, Illinois, and in arranging the papers he said that he would be obliged to bring suit in United States circuit court against certain parties, and that to do so he would have to convey the lands to some good party outside of the State. I suggested my brother-in-law, the said Fernando B. Hane, then living in Canton, Ohio, and had the deed prepared conveying such lands as were so shown as recorded in said deeds. The said Hane did not pay any money or any other consideration for the said lands, and was only used for convenience to allow the said suit to be brought, &c., and I, myself, went to Springfield and paid $100 to the marshal to begin serving the papers, and also left the deeds of said land with the recorder at Fairfield, Ill., for record there in Wayne county.

The sale of the lands was not consummated by me, and I aban-

doned the trial to sell when there was so much litigation in regard to them. After Judge Walter B. Scates' death the said Fernando B. Hane reconveyed said lands to the heirs of said Scates, and all the subject-matter and interest of said lands was with and in the said Walter B. Scates, the said Fernando B. Hane having no valid interest in them whatever.

JAMES C. HYDE.

16 STATE OF ILLINOIS, } ss.
Cook County, }

Personally appeared before me, J. Lewis Lee, a notary public in and for the said county and State aforesaid, James C. Hyde, personally known to me, and to the question propounded in the above-entitled cause makes answer in his own handwriting, to which answer so made he was duly sworn by me and acknowledged the same to be true of his own knowledge, with the parties thereto.

[SEAL.] J. LEWIS LEE,
Notary Public.

Chicago, 6 Sept., 1890.

(Indorsed:) Filed October 6, 1890. James T. Jones, clerk.

17 Charles Scates *et al.* }
to
Mary Scates. }

This indenture witnesseth that the grantors Charles Scates, William Scates, Mary E. Scates, and Lelia J. Scates all unmarried and residing in Cook county, Illinois, Walter Scates and Georgea Scates his wife, Clarence Scates *Scates*, Maggie S. Scates his wife of said county and Eugene Scates and Aurelice N. Scates his wife of Sterling Whiteside county Illinois, all of lawful age, the said Charles, William, Mary E., Lelia T., Walter, Clarence, and Eugene being the only children and heirs-at-law of Walter B. Scates, deceased, for the consideration of one dollar ($1.00) to them in hand paid and for other good and valuable considerations convey and quitclaim to Mary Scates of Cook county State of Illinois all their interest in all the lands heretofore held and owned by Walter B. Scates deceased in the county of Wayne and State of Illinois, whether held and owned by him by legal title or in which he had a beneficial interest at the time of his death, and particularly those lands heretofore conveyed in trust to Fernando B. Hane by said Walter B. Scates the beneficial title to which remains in the said grantors the heirs-at-law of said Walter B. Scates deceased, said Hane having only a naked legal title thereto. And likewise all lands heretofore conveyed by said Walter B. Scates to James C. Cloyd in trust the beneficial title to which remains in the said grantors the heirs-at-law of said Walter B. Scates deceased — said

Cloyd county having only a naked legal title thereto all of above-mentioned lands being in Wayne county Illinois.

Dated this 28th day of October, A. D. 1886.

18

CHARLES SCATES. [SEAL.]
WILLIAM SCATES. [SEAL.]
MARY E. SCATES. [SEAL.]
LELIA T. SCATES. [SEAL.]
WALTER SCATES. [SEAL.]
GEORGIA SCATES. [SEAL.]
CLARANCE SCATES. [SEAL.]
MAGGIE SCATES. [SEAL.]
EUGENE SCATES. [SEAL.]
AMELIA SCATES. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, H. C. Whitney, a notary public in — for said county, in the State aforesaid, do hereby certify that Charles Scates, William Scates, Mary E. Scates, Lelia T. Scates, Walter Scates, Georgia ——, Clarence Scates, Maggie S. Scates, and Eugene Scates, personal-y known to me to be the same persons whose names are subscribed to the foregoing instrument, — before me this day in person and acknowledged that they signed, sealed, and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead; and I further certify that Charles Scates, William Scates, Mary E. Scates, Lelia I. Scates, Walter Scates, Clarence Scates, and Eugene Scates are the only children and heirs-at-law of Walter B. Scates, deceased, and he left surviving him no other child or descendent of a deceased child.

Given under my hand and notarial seal this 28th day of October, A. D. 1886.

[SEAL.]

H. C. WHITNEY,
Notary Public.

STATE OF ILLINOIS, } ss:
Whiteside County, }

19 I, H. C. Ward, a notary public within and for the county and State aforesaid, do hereby certify that Amelia N. Scates, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of October, 1886.

[SEAL.]

H. C. WARD,
Notary Public.

Filed 6th September, A. D. 1887, at 1 p. m.

R. E. MABRY, *Recorder.*

STATE OF ILLINOIS, } ss:
Wayne County, }

I, S. H. Rea, clerk of the circuit court and *ex officio* recorder within and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a true and complete copy of the records of a deed from Charles Scates *et al.* to Mary Scates, which appears of record in Book 55, page 183, which book is a part of the records of my office.

[SEAL.] Witness my hand and seal of said court, at my office, in Fairfield, Illinois, this 4th day of September, A. D. 1890.

S. H. REA,
Clerk & Recorder.

20 UNITED STATES OF AMERICA, } ss:
State of Illinois, }

In Circuit Court, Southern Dist. Illinois, June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, Lucinda A. Walker, Elizabeth H. Taylor, J. Sargeant Smith, Chas. A. Coe, Arthur F. Gould, H. M. Alexander, C. T. Austin, *et al.*
vs.
M. M. WHEELER *et al.*
} Consolidated Cases. To Reforeclose Mortgage.

To Lucinda A. Walker.

Sir: Please take notice that on the affidavit, a copy whereof you are herewith served, attached to this notice, and other proof to sustain the same, a motion was filed in the above cause in the circuit court of the United States for the southern dist. of Ill., before the judge of the said court, of the 7th day of July, 1890, at 10 o'clock, to be taken up on 9th of Sept., 1890, at 2 o'clock p. m., or as soon as counsel can be heard, and was continued to the 6th of Oct., or as soon as counsel can be heard, that the court order that the decree in said cause had therein may be set aside, and that the suit be dismissed at complainants' cost, for the reason, and that the record and facts show, that the court had no jurisdiction.

H. TOMPKINS,
Att'y Sel. & for Def'ts.

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

21 H. Tompkins, one of the above-named def'ts and as att'y for def'ts, being duly sworn, says that the statement that the record and facts to be produced will show that the court had no jurisdiction.

H. TOMPKINS.

Sworn to before me this 1st day of July, 1890.

WM. H. VANDEWATER, *N. P.*

22 UNITED STATES OF AMERICA, *Southern Dist. of Illinois,* } ss:

In Circuit Court United States, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, FERNANDO B. HANE, LUCINDA A. WALKER, ELISABETH H. TAYLOR, WM. RALSTON, F. M. ALEXANDER, CHAS. COE, C. T. AUSTIN, J. SARGEANT SMITH, and ARTHUR J. GOULD

vs.

M. M. WHEELER *et al.*

(Consolidated Cases.) Reforeclosure of Mortgage.

Motion to set aside decree and dismiss suit for want of jurisdiction.

Lucinda A. Walker:

Please to take notice that the deposition of yourself, of the city of Revere, in Suffolk county, State of Mass., who reside more than one hundred miles from Springfield, Ill., where the court at which the above-entitled cause, upon the motion as above, will be tried is to be held, will be taken, to be read in evidence at the trial of said cause on part of the def'ts therein, before George A. Poor, Esquire, a notary public for the county of Suffolk and State of Mass., in the city of Boston, on the 27th day of October, 1890, at 11 o'clock a. m., at which time and place you are hereby notified to be present and put inter-gations to the said witnesses if you should think fit.

Dated at Fairfield, Ill., this 8th day of Sept., 1890.

H. TOMPKINS,
Att'y for Def'ts & Motion.

To Lucinda A. Walker.

—— ——, att'y for compl'ts, Fairfield, Ill.

23 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

To Lucinda A. Walker, of Revere, in the county of Suffolk, Greeting:

Whereas H. Tompkins, of Fairfield, in the State of Illinois, has requested me to take your deposition, to be used in the action of J. C. Cloyd and others against M. M. Wheeler, yourself, and others, now pending in the circuit court of the United States for the southern district of Illinois, *and* the office of Geo. H. Poor, 54 Devonshire street, in Boston, in said county of Suffolk, *and* the 27th day of October, in the year of our Lord one thousand eight hundred and ninety, at eleven of the clock in the forenoon, are appointed the time and place for the said deponent to testify what she know- relating to said action. You are hereby notified that you may then and there be present and put such interrogatories as you may think fit.

Given under my hand and seal, at Boston, Mass., on the
[L. S.] twenty-fifth day of October, in the year of our Lord one thousand eight hundred and ninety.

GEORGE H. POOR,
Notary Public.

Oct. 27, 1890.—Service of the above notice is accepted.
LUCINDA A. WALKER.

24 SUFFOLK, *ss:*

Commonwealth of Massachusetts to Lucinda A. Walker, of Revere, in said county of Suffolk, Greeting:

You are hereby required in the name of the Commonwealth of Massachusetts to appear before the *the* subscriber, a notary public, at his office, No. 54 Devonshire street, in the city of Boston, within and for the county of Suffolk, on the — day of October, 1890, at — o'clock in the — noon, to give your deposition and evidence of what you know relating to an action or complaint pending in the United States circuit court for the southern district of Illinois, in which action J. C. Cloyd and others are plaintiffs and M. M. Wheeler, yourself, and others are defendants.

Hereof fail not, as you will answer your default under the pains and penalties in the law in that behalf made and provided.

Dated at Boston, the 25th day of October, A. D. 1890.

GEO. H. POOR,
Notary Public.

(On back:) Oct. 27, 1890.—Service of the within subpœna is accepted. Lucinda A. Walker.

25 UNITED STATES OF AMERICA, } *ss:*
Southern District of Illinois, }

COMMONWEALTH OF MASSACHUSETTS, }
County of Suffolk. }

Be it remembered that on this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and ninety, I, George H. Poor, a notary public, on the filing with a notice of motion filed in the cause entitled J. C. Cloyd, Lucinda A. Walker, *et al.*, consolidated causes, *v.* M. M. Wheeler *et al.*, pending in circuit court of the United States, southern dist. Ill.; also notice to take the deposition of Lucinda A. Walker, one of the complainants in said cause—

Did call and cause to be and personally appear before me, at my office, at 54 Devonshire street, in the city of Boston, in the State of Massachusetts aforesaid, Lucinda A. Walker, to testify and the truth to say on the part and behalf of the def'ts in a certain civil cause or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of Ill., at Springfield, wherein J. C. Cloyd, Lucinda A. Walker, *et al.*, consolidated causes, *v.* M. M. Wheeler *et al.*

And the said LUCINDA A. WALKER being about the age of twenty-six years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Lucinda A. Walker, and she did thereupon depose, testify, and say as follows, viz:

First interrogatory. What is your name, age, and place of residence, and are you married or single?

26 First answer. My name is Lucinda A. Walker; my age twenty-six years; I reside in Revere, Massachusetts, and I am the wife of William W. Walker.

2d Int'y. Give your maiden name and the names of your father and mother, and when were you married?

2d answer. My name was Lucinda A. Whitney, my father's name is Henry C. Whitney, my mother's Sarah A. Whitney, and I was married Nov. 27th, 1884.

3d Int'y. Where did you reside before your marriage, and when did you remove from there?

3d answer. I resided at Chicago, Illinois, at the time of and before my marriage, and removed to Revere when I was married.

4th Int'y. Have you ever since resided in Massachusetts?

4th answer. I have.

5th Int'y. State if you are the same Lucinda A. Walker named in the suit for which this deposition is taken, wherein H. C. Whitney is attorney.

5th answer. I am.

6th Int'y. State if your father and mother joined in a deed to you of the swamp lands situated in Wayne county, Illinois, claimed to be owned by your father, to which this suit relates.

6th answer. They did.

7th Int'y. Can you give the date or about the date of said deed to you?

7th answer. I cannot give the exact date, but it was in the month of December following my marriage, I think.

8th Int'y. Was any consideration paid by you for said deed?

8th answer. I did not pay anything. It was for love and affection. It was a present.

27 9th Int'y. Have you and your husband ever conveyed the same lands to your mother, who was then residing in Chicago?

9th answer. We have.

10th Int'y. When or about what time was said reconveyance made?

10th answer. I have forgotten, but I think it was in the fall of 1887.

11th Int'y. Was any consideration paid you for said reconveyance; if so, by whom was it paid?

11th answer. My father sent me five dollars. That was all the land was worth to me.

12th Int'y. Where were you when the conveyance was made by your father to you?

12th answer. I was in Revere.

13th Int'y. Did you at the time of his conveyance to you have any conversation with your father about it?

13th answer. We did have some.

14th Int'y. State what you can recollect of that conversation.

14th answer. I can't recollect much about it. He said he had deeded the land to me and I was recorded as a land-owner.

15th Int'y. Do you recollect his giving any reason why he made the deed to you?

15th answer. I do not.

16th Int'y. Was that deed made to you by your father that he might bring suit in the United States court in your name?

16th answer. I do not know.

17th Int'y. State all you can recollect of what passed between you and your father in relation to the deed from you to your mother.

17th answer. I received a letter from my father inclosing a deed and five dollars. He asked me in the letter to go before a
28 notary and sign it; that he wished me to deed it back to mother, as the land was of no value to me then.

18th Int'y. Is that letter in existence now?

18th answer. I think not. I am very sure it is destroyed.

19th Int'y. Do you recollect anything else in the letter relating to this transaction?

19th answer. I do not.

20th Int'y. Was that all that passed between you and your father in relation to this last deed?

20th answer. That was all.

21st Int'y. Then both these deeds were made at the suggestion of your father, were they not?

21st answer. They were.

22nd Int'y. Were not these deeds made above at the suggestion of your father, so that he could bring suit in the United States court?

22nd answer. I don't know.

23d Int'y. Do you know anything else relating to these transactions?

23d answer. I do not.

LUCINDA A. WALKER.

29 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

J. C. CLOYD & *al.*
vs.
M. M. WHEELER & *al.*

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, }

I, George H. Poor, a notary public within and for the county of Suffolk and Commonwealth of Massachusetts, do hereby certify that

the reason for taking the foregoing deposition is and the fact is the witness is a material and necessary in the cause in the caption of the said deposition named, and that she resides more than one hundred miles from the place where the court is held and the cause submitted and would not be in attendance thereat.

I further certify that a notification of the time and place of taking the said deposition, signed by me, was made out and served on the said Lucinda A. Walker, the witness, to be present at the taking of the deposition and to put interrogatories if she or they might think fit.

I further certify that on the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and ninety, I was attended by George Mornel, Esq., acting as counsel for the plaintiffs or complainants, and by the witness, who was and is of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth and the deposition was by me reduced to writing in the presence of the witness and, after carefully reading the same to the witness, she subscribed the same in my pres-
30 ence. I have retained the said deposition in my possession for the purpose of certifying the same with my own hand and returning it to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties to the said deposition and caption named nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and notarial seal this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.]

GEO. H. POOR,
Notary Public, Suffolk County, Mass.

Notary's fees, $25.
G. H. POOR, *N. P.*

31 STATE OF ILLINOIS, } ss:
Cook County, }

The people of the State of Illinois to Sarah A. Whitney:

You are hereby commanded to appear before me, a notary public in and for said county, at No. 141 South Western avenue, in the city of Chicago, in said county, on Saturday, the 6th day of September, A. D. 1890, at 10 o'clock a. m., then and there to testify the truth in a suit now pending in the U. S. circuit court for the southern district of Illinois, county aforesaid, wherein J. C. Cloyd and others are plaintiffs and M. M. Wheeler and others are defendants; and this you shall in nowise omit under the penalty of the law.

Given under my hand and notarial seal this 4th day of Sept., A. D. 1890.

[SEAL.]

A. W. UNDERWOOD,
Notary Public.

32 UNITED STATES OF AMERICA,
Northern District of Illinois, City of Chicago,
County of Cook.

Be it remembered that on this 6th day of September, in the year of our Lord one thousand eight hundred and ninety, I, Arthur W. Underwood, a notary public in and for said county and State, on filing with me a notice of motion in the cause of J. C. Cloyd, J. B. Cornell, Fernando B. Hane, Lucinda A. Walker, *et al.*, consolidated causes, *vs.* M. M. Wheeler *et al.*, pending in circuit court United States in and for the southern district of Illinois, which motion is hereto attached, also notice to take the deposition *de bene esse* of Sarah A. Whitney, said notice being marked "Exhibit A," did call and cause to be and personally appear before me, at No. 141 South Western avenue, in the city of Chicago, in the said northern district of Illinois, in the State aforesaid, the said Mrs. Sarah A. Whitney to testify and the truth to say on the part and behalf of the defendants in a certain civil cause or matter of controversy no- depending and undetermined in the circuit court of the United States for the southern district of Illinois, at Springfield, in said State, wherein J. C. Cloyd, J. B. Cornell, Fernando B. Hane, Lucinda A. Walker, *et al.*, and consolidated causes, *vs.* M. M. Wheeler *et al.*

And the said Mrs. SARAH A. WHITNEY being about the age of forty-eight years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Mrs. Sarah A. Whitney, and she did thereupon depose, testify, and say as follows in response to the interrogatories put to
33 said witness orally by the attorney for the defendants in said consolidated causes; which interrogatories, together with the answers of said witness thereto, are as follows, to wit:

34 Question 1. What is your name, age, and place of residence?

Answer. Sarah A. Whitney, forty-eight years, No. 141 Western Ave., Chicago, Ill.

Q. 2. How long have you lived in Illinois and in Chicago?

Ans. In Illinois about 38 years and in Chicago about 33 years.

Q. 3. State if you are married and your husband's name.

Ans. I am; Henry C. Whitney.

Q. 4. What is your husband's occupation and place of business?

Ans. Lawyer; at 44 Ashland block, Chicago.

Q. 5. How long did he have his office in the Ashland block?

Ans. About fifteen years.

Q. 6. Is your husband at present able to attend to his business?

Ans. He is not.

Q. 7. When did he become incapacited for business and what was the cause thereof?

Ans. June 1st, 1888, about; insanity, caused by an injury.

Q. 8. Are you acquainted with Lucinda A. Walker and is sh related to you?

Ans. Yes; she is my daughter.

Q. 9. When was Lucinda A. Walker married?

Ans. On November 27th, 1884.

Q. 10. Where was she married and how old when married?

Ans. At Chicago; twenty years of age.

Q. 11. Whom did she marry?

Ans. William W. Walker.

Q. 12. Wher did Lucinda A. Walker remove from Illinois and where did she go?

35 Ans. About Christmas, 1884; to Boston.

Q. 13. Where does she now reside, and has she been there steadily since leaving here?

Ans. Beechmont, Revere, Massachusetts, a suburb of Boston. She has always been there since leaving here.

Q. 14. State whether about March 4th, 1887, you joined with your husband in conveying to said Lucinda A. Walker a large body of land in Wayne county, Illinois, which is named in this litigation.

Ans. Yes; I did.

Q. 15. State what consideration was received for this conveyance.

Ans. I cannot. It was a transaction between my husband and my daughter.

Q. 16. Do you know whether there was any consideration for the transfer?

Ans. I really do not know about that.

Q. 17. You do not know whether or not there was any consideration?

Ans. I can tell you positively nothing about that.

Q. 18. Was this same land on 20th Sept., 1887, reconveyed to you by Lucinda A. Walker and her husband?

Ans. It was reconveyed, but I cannot say about the time. I think it was in the spring of 1887, and I think that the conveyance to Lucinda A. Walker must have been two or three years earlier than I said before, as I am sure that she held it for two or three years.

Q. 19. What consideration was paid for the reconveyance?

Ans. I know that some money was paid, but can tell noth-

36 ing whatever about the amount.

Q. 20. Do you know who holds the beneficial interest in this land?

Ans. I do not understand your question.

Q. 21. Does the title to this land stand in your name?

Ans. Yes; I have deeds and abstracts for about 6,000 acres in my own name.

Q. 22. For what purpose was this land conveyed by you to Mrs. Walker?

Ans. I don't know. It was Mr. Whitney's affair and I did not inquire into it at all.

Q. 23. Who has attended to the legal questions affecting this land since Mr. Whitney's incapacity for business?

Ans. I have myself, through my lawyer in Wayne county, Mr. Beecher.

Q. 24. Have you lived in Chicago continuously during the whole of the 33 years you spoke of?

Ans. We have not lived here continuously during all of that time, but we have always called it our home.

Q. 25. When did you first come to Chicago?

Ans. In the spring of 1858, I think.

Q. 26. How long after that time did you remain here continuously?

Ans. Until 1861, when we moved to Cincinnati, where we lived about three years; probably between 1861 and 1865.

Q. 27. Where did you go from Cincinnati, and when?

Ans. To Nashville; about 1865.

Q. 28. How long did you remain in Nashville?

Ans. Not more than six months.

37 Q. 28. Where did you go from Nashville?

Ans. To Lawrence, Kansas.

Q. 30. How long did you reside there?

Ans. About three years.

Q. 31. Where did you go from Lawrence?

Ans. To Humboldt, Kansas, and remained there three years.

Q. 32. Where did you go from Humboldt, and when?

Ans. To Chicago; between seventeen and eighteen years ago—about 1871 or 1872.

Q. 33. Have you always been here since that time?

Ans. Mr. Whitney's office has always been here, and it was our home, though I was not contented here. We lived in Florida a couple of years, beginning about 1882, and since our return from there have not left Chicago to live at all.

SARAH A. WHITNEY.

38 EXHIBIT "A."

UNITED STATES OF AMERICA, } ss:
Southern Dist. of Illinois, }

In Circuit Court United States, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, FERNANDO B. HANE, LUCINDA A. WALKER, ELISABETH H. TAYLOR, WM. RALSTON, F. M. ALEXANDER, CHAS. COE, C. T. AUSTIN, J. SARGEANT SMITH, and ARTHUR J. GOULD	(Consolidated Cases.) Foreclosure of Mortgage.
vs.	
M. M. WHEELER *et al.*	

Motion to set aside decree and dismiss suit for want of jurisdiction.

Please to take notice that the deposition — Sarih A. Whitney, of the city of Chicago, in Cook Co., State of Ill., who reside- more than

one hundred miles from Springfield, Ill., where the court at which the above-entitled cause, upon the motion as above, will be tried is to be held, will be taken, to be read in evidence at the trial of said cause on part of the def'ts therein, before —, in the city of Chicago, on the — day of ——, 1890, at —, at which time and place you are hereby notified to be present and put interrogatories to the said witnesses if you should think fit.

Dated at Fairfield, Ill., this 28 day of Aug., 1890.

To Lucinda A. Walker, compl't.

STATE OF ILLINOIS, } ss:
Wayne County, }

39 I, H. Tompkin-, att'y for the def'ts and for the pending motion, being duly sworn, depose and say that there is — att'y on whom the within notice can be served acting as such for Lucinda A. Walker; that the att'y of the — is confined in an insane asylum at Kankakee, Ill.; that the said Lucinda A. Walker cannot be found at the place where it is represented that she resided, after the most thorough diligence on the part of affiant and others.

H. TOMPKINS.
Att'y for Def't.

Subscribed and sworn to before me this 28 day of Aug., 1890.
A. M. ELLIOTT, *N. P.*

40 EXHIBIT "B."

UNITED STATES OF AMERICA, }
State of Illinois. }

In Circuit Court, Southern Dist. Illinois, June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, Lucinda A. Walker, Elisabeth H. Taylor, Chas. A. Coe, J. Sargeant Smith, Arthur F. Gould, H. M. Alexander, C. T. Austin, *et al.*
vs.
M. M. WHEELER *et al.*
} Consolidated Cases. To Reforeclose Mortgage.

To Mrs. Lucinda A. Walker.

Sir: Please take notice that on the affidavit, a copy whereof you are herewith served, attached to this notice, and other proof to sustain the same, a motion was filed in the above cause in the circuit court of the United States for the southern dist. of Ill., before the judge of the said court, on the 7th day of July, 1890, at 10 o'clock, to be taken up on the 9th of Sept., at 2 o'clock p. m., 1890, or as soon as counsel can be heard, that the court order that the decree in said cause had therein may be set aside, and that the suit be dismissed

at complainants' cost, for the reason, and that the record and facts show, that the court had no jurisdiction.

H. TOMPKINS,
Att'y Sel. & for Def'ts.

UNITED STATES OF AMERICA, }
State of Illinois, } ss:

41 H. Tompkins, one of the above-named def'ts and as att'y for def'ts, being duly sworn, says that the statement that the record and facts to be produced will show that the court had no jurisdiction —.

H. TOMPKINS.

Sworn to before me this 1st day of July, 1890.

W. VANDEWATER, *N. P.*

42 UNITED STATES OF AMERICA, }
Northern District of Illinois, County of Cook, } ss:

I, Arthur W. Underwood, a notary public in and for said county and State, do hereby certify that the reason for taking the foregoing deposition is and the fact is the witness is material and necessary in the cause in the caption of the said deposition named, and that she resides more than one hundred miles from the place where the court is held and the cause to be heard and submitted and would not be in attendance thereat.

I further certify that the accompanying notification of the time and place of taking the said deposition, marked Exhibit "B," — signed by the attorney for defendants, with affidavit that the same could not be served upon the said Lucinda A. Walker, as appears from said affidavit, after due diligence, to be present at the taking of the deposition and to put interrogatories if he or they might think fit.

I further certify that on the 6th day of September, in the year of our Lord one thousand eight hundred and ninety, I was attended by Henry S. Shedd, an attorney-at-law representing said defendants, and by the witness, who was and is of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and, after carefully reading the same to the witness, she subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of signing and sealing the same with my own hand and notarial seal and

43 returning the same with my own hand to the United States circuit court for the southern district of Illinois, the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and notarial

seal this 6th day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

A. W. UNDERWOOD,
[SEAL.] *Notary Public.*

44 STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to Charles Scates:

You are hereby commanded to appear before me, a notary public in and for said county, at my office, No. 1105 Tacoma building, No. 133 La Salle street, in the city of Chicago, in said county, on Monday, the 8th day of Sept., A. D. 1890, at 5 o'clock p. m., then and there to testify the truth in a suit now pending in the U. S. circuit court of the southern district of Illinois, wherein J. C. Cloyd *et al.* are plaintiffs and W. W. Wheeler *et al.* are defendants; and this you shall in nowise omit under the penalty of the law.

Given under my hand and notarial seal this 8th day of Sept., A. D. 1890.

A. W. UNDERWOOD,
Notary Public.

45 UNITED STATES OF AMERICA, }
Northern District of Illinois, City of Chicago, } ss:
County of Cook, }

Be it remembered that on this 8th day of September, in the year of our Lord one thousand eight hundred and ninety, I, A. W. Underwood, a notary public, on the filing with me of a notice of motion in the cause of J. C. Cloyd, J. B. Cornell, Fernando B. Hane, *et al.*, consolidated causes, *vs.* M. M. Wheeler *et al.*, pending in the circuit court of the United States in and for the southern district of Illinois, which notice is hereto attached, marked Exhibit A, with a return thereon made by the sheriff at Canton, Stark county, State of Ohio, also notice to take the deposition *de bene esse* of Charles Scates, did call and cause to be and personally appear before me, at my office, at room No. 1105, in the Tacoma building, No. 133 La Salle street, in the city of Chicago, in the said northern district of Illinois, in the State aforesaid, the said Charles Scates and Lelia I. Scates to testify and the truth to say on the part and behalf of the defendants, and for the motion in a certain civil cause or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of Illinois, at Springfield, wherein J. C. Cloyd, J. B. Cornell, Fernando B. Hane, *et al.* are complainants and M. M. Wheeler and others are defendants, consolidated causes, of which parties complainant Fernando B. Hane, above named, is the only one against whom this deposition is designed to be used.

And the said Charles Scates and Lelia I. Scates being about the age of thirty-nine and thirty-four years respectively and having

each been by me first cautioned and sworn to testify the
46 truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Charles Scates and Lelia I. Scates, and *he* did thereupon depose, testify, and say as follows, as appears by the questions and answers thereto to the accompanying depositions, headed respectively "deposition of Lelia I. Scates" and "deposition of Charles Scates," to wit:

47 *Deposition of Lelia I. Scates.*

Q. 1. State your name, age, and residence.

Ans. Lelia I. Scates; thirty-four years; No. 1002 Geore St., Evanston, Cook county, Illinois.

Q. 2. Were you acquainted with Walter B. Scates, now deceased, who lived in Chicago, Cook county, Illinois?

Ans. Yes.

Q. 3. Were you related to him, and how?

Ans. I am his daughter.

Q. 4. What is the date of his death?

Ans. Oct. 20, 1886.

Q. 5. Where did Walter B. Scates reside during the years 1884 & 1885?

Ans. In Evanston, Cook county, Illinois.

Q. 6. Are you acquainted with Fernando B. Hane and J. C. Cloyd, complainants in this suit?

Ans. I am acquainted with Mr. Cloyd, but not with Mr. Hane.

Q. 7. About what time did you meet Mr. J. C. Cloyd?

Ans. About three years before my father's death I met him first.

Q. 8. Will you state if you are one of the heirs of Walter B. Scates, deceased, who, with Charles Scates, William Scates, and the other heirs of Walter B. Scates, deceased, joined in a deed dated Oct. 30th, 1886, conveying to your mother, Mary Scates, certain lands in Wayne county, Illinois, involved in the above-entitled suit, or, rather, all the interest in said lands held and owned by Walter B. Scates, deceased, whether held and owned by him by legal title or in which he had a beneficial interest at the time of his death, and particularly those lands theretofore conveyed in trust to Fernando B. Hane by said Walter B. Scates?

Ans. Yes, I am, and I joined in this deed.

48 Q. 9. Do you remember what, if any, consideration was paid for this deed?

Ans. One thousand dollars, I think, was the amount paid.

Q. 10. Do you mean for the conveyance by you to your mother?

Ans. No; I misunderstood you. For that conveyance by us to mother there was no consideration. The deed said one dollar, the usual form, but there was no money paid to us.

Q. 11. Has there ever been a conveyance by Hane and Cloyd to Mary Scates, your mother, or to the heirs of Walter B. Scates, de-

ceased, of the legal title held by them to these lands or any of them?

Ans. No; the only such deeds were three releases by Mr. Hane of three small tracts of land of forty acres or so apiece, which releases were made to the parties to whom mother had made deeds of those pieces.

Q. 12. Was any consideration paid Mr. Hane for these releases?

Ans. No; there was not.

Q. 13. Was any consideration paid to your mother for her deeds to these pieces of land?

Ans. Yes; small sums; from forty to one hundred dollars, as nearly as I can recollect.

LELIA I. SCATES.

49 *Deposition of Charles Scates.*

Q. 1. State your name, age, and residence.

Ans. Charles Scates; thirty-nine years; Evanston, Cook county, Illinois.

Q. 2. Were you acquainted with Walter B. Scates, now deceased, formerly of Cook county, Illinois, in his lifetime; were you related to him; and, if so, what was your relation?

Ans. Yes, sir; he was my father.

Q. 3. Are you acquainted with Fernando B. Hane & J. C. Cloyd, plaintiffs in the above-entitled suit; and, if so, how long have you been acquainted with them?

Ans. No; I never saw either of them to my knowledge.

Q. 4. State if you are the Charles Scates who, as one of the heirs of Walter B. Scates, deceased, joined with the other heirs of said Walter B. Scates, deceased, in a deed dated Oct. 30, 1888, conveying to your mother, Mary Scates, certain lands in Wayne county, Illinois, involved in the above-entitled suit.

Ans. I joined with my brothers and sisters in a deed, the date of which I do not remember, conveying all our interests as heirs of Walter B. Scates to all lands in Wayne county that he once owned to my mother.

Q. 5. State if there was ever a conveyance of the above-described lands or any part thereof to Fernando B. Hane *vs.* J. C. Cloyd in trust.

Ans. I never saw the deeds and never saw the record.

Q. 6. Was there, to your knowledge, any agreement executed by Walter B. Scates, deceased, for the conveyance of this land or any part thereof in trust to either said Hane or said J. C. Cloyd?

Ans. There was an agreement to convey a part to Hane in trust. I know of no other.

50 Q. 7. Do you know of any conveyances to Cloyd or have you any understanding that there was such a conveyance in trust; and, if so, what do you understand its object to have been? Please state fully your information and understanding on this subject.

Ans. I have no direct knowledge of any such conveyance. I have

understood for many years that J. C. Cloyd held some of father's lands in trust. This knowledge did not come from Cloyd. I know nothing of the consideration; father never spoke of that to me, and he never mentioned the object. I took it for granted that it was for the purpose of bringing suit in the United States court.

Q. 8. Do you believe there was any consideration for this deed to Cloyd?

Ans. I do not, but I know absolutely nothing about it.

Q. 9. Do you know where Cloyd then lived?

Ans. I understand in New York, and my impression is that he is a lawyer.

CHARLES SCATES.

51 EXHIBIT A.

UNITED STATES OF AMERICA, *State of Illinois*, } *ss*:

In Circuit Court, Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, Lucinda A. Walker, & Elisabeth H. Taylor, *et al.*
vs.
M. M. WHEELER *et al.*
} Consolidated Cases. To Reforeclose Mortgage.

Fernando B. Hane, Esq.

SIR: Please take notice that on the affidavit, with a copy whereof you are herewith served, attached to this notice, and other proof to sustain the same, a motion was filed in the above cause in the circuit court of the United States for the southern dist. of Ill., before the judge of the said court, on the 7th day of July, 1890, at 10 o'clock, to be taken up on the 9th day of Sept., 1890, or as — counsel can be heard, that the court order the decree in said cause had therein may be set aside, and that the suit be dismissed at complainants' cost, for the reason, and that the record and facts show, that the court had no jurisdiction.

H. TOMPKINS,
Att'y & for Def'ts.

UNITED STATES OF AMERICA, *State of Illinois.* }

I, H. Tompkins, one of the above-named def'ts and as att'y for def'ts, being duly sworn, says that the statement that the record and facts to be produced will show that the court had no jurisdiction —.

H. TOMPKINS.

WM. H. VANDEWATER, *N. P.*

STATE OF OHIO, } ss:
Stark County, }

Re'd this notice August 4th, 1890, at 10 o'clock, and the within-named F. B. Hane not found in my county.
Aug. 7th, 1890.

C. A. KRIDER,
Sheriff Stark County, Ohio.

52 EXHIBIT "B."

STATE OF ILL., } ss:
Cook Co., }

In Circuit Court U. S., Southern Dist. Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, *et al.* *vs.* M. M. WHEELER *et al.* } Consolidated Causes. Reforeclosure of Mortgage.

Motion to set aside decree and dismiss the suit.

F. B. Hane, Esq., and J. C. Cloyd.

SIRS: Please take notice that your deposition- as parties to intervening petition in the above-entitled cause and Charles Scates, a resident of Chicago, Ill., who resides more than one hundred miles from Springfield, Ill., where the court at which the above-entitled cause, upon the motion, will be tried is to be held, will be taken, to be read in evidence at the hearing of the said motion on the part of the def't therein, before A. W. Underwood, a notary public, at 1105 Tacoma building, his office, in the city of Chicago, at 5 o'clock p. m. on the 8th day of Sept., 1890.
Dated Fairfield, Ill., Aug. 25, 1890.

H. TOMPKINS,
Att'y for Def't-.

I have been unable to find Fernando B. Hane, as appears by return of sheriff of Stark Co., Ohio, and there appearing no known attorney, either for Hane nor Cloyd, in this matter, no notice could be given further than the above, in the hope the court would meet.

H. TOMPKINS,
Att'y for Def'ts.

53 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

I, A. W. Underwood, a notary public of the city of Chicago and in and for the county of Cook and State of Illinois, do hereby certify that the reason for taking the foregoing deposition is and the fact is the witnesses are material and necessary in the cause in the

caption of the said deposition named, and that they reside more than one hundred miles from the place where the court is held and the cause to be submitted, and that they would not be in attendance thereat.

I further certify that the accompanying notification, marked Exhibit "B," of the time and place of taking the said deposition, signed by the attorney for the defendants, could not be served on the complainant J. B. Harris, as appears from the return of the sheriff of Canton, Ohio, at which place he is represented to be a citizen and resident, to be present at the taking of the deposition and to put interrogatories if he or they might think fit, and that there is hereto attached a statement of the postmaster of Canton, above referred to, that said Fernando B. Hane's whereabouts are not known.

I further certify that on the 8th day of September, in the year of our Lord one thousand eight hundred and ninety, I was attended by Henry S. Shedd, an attorney-at-law representing the said defendants, and by the witnesses, who are of sound mind and lawful age, and the witnesses, Charles Scates and Lelia I. Scates, — by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses and, after carefully reading the same to the witnesses, they sub-
54 scribed the same in my presence. I have retained the said depositions in my possession for the purpose of signing the same with my own hand and attaching my notarial seal and forwarding the same, so signed and sealed with my own hand, to the circuit court of the United States in and for the southern district of Illinois, the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and notarial seal this 8th day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th.

A. W. UNDERWOOD,
Notary Public, Cook Co., Ill.

[SEAL.]

55 UNITED STATES OF AMERICA, *State of Ill.*, } *ss:*

In Circuit Court of the United States, Southern Dist. of Ill., June Term, 1890.

J. C. CLOYD, J. B. CORNELL, F. B. HANE, Lucinda A. Walker, Elizabeth H. Taylor, Chas. Coe, J. Sargeant Smith, Arthur F. Gould, H. M. Alexander, C. T. Austin *vs.* M. M. WHEELER *et al.* } Consolidated Cases. Reforeclosure of Mortgage.

To J. C. Cloyd and J. B. Cornell *et al.:*

Take notice that the deposition- of E. T. Hall, R. P. Hanna, & E. Beecher, of Fairfield, Ill., who reside more than one hundred miles from Springfield, Ill., where the court at which the above-entitled cause, upon the motion, will be tried is to be held, will be taken, to be read in evidence at the hearing of the said motion on the part of the def'ts therein, before Wm. H. Vandewater, a notary public, at his office, in Fairfield, Ill., on the first day of Oct., 1890, at 3 o'clock p. m., at which time and place you are hereby notified, if you think best, to be present and put cross-interrogatories to the said witness.

H. TOMPKINS,
Att'y for ——.

56 UNITED STATES OF AMERICA, *Southern District of Illinois, City of Fairfield, County of Wayne,* } *ss:*

Be it remembered that on this 50th day of September, in the year of our Lord one thousand eight hundred and ninety, I, Wm. H. Vandewater, a notary public, on the filing with me a notice to take the deposition- of E. T. Hall, R. P. Hanna, & E. Beecher, filed in the cause of J. C. Floyd, J. B. Connell, F. B. Hane, *et al.*, consolidated cases, *vs.* M. M. Wheeler *et al.*, pending in the circuit court of the United States, southern district of Illinois, which notice is hereto attached to the depositions *de bene esse* of E. T. Hall & R. P. Hanna, did call and cause to be and personally appear before me, at my office at ——, in the city of Fairfield, in the said southern district of Illinois, in the State aforesaid, Ezra T. Hall and Rob't P. Hanna to tes-ify and the truth to say on the part and behalf of the defendants in a certain civil cause or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of Illinois, at Springfield, Illinois, wherein J. C. Cloyd, J. B. Connell, F. B. Hane, Lucinda A. Walker, Elizabeth H. Taylor, Chas. Coe, J. Sargeant Smith, Arthur F. Gould, H. M. Alexander, C. T. Austin, an- consolidated cases *vs.* M. M. Wheeler *et al.*, defendants.

And the said EZRA T. HALL being about the age of fifty-two (52) years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Ezra T. Hall, and he did thereupon depose, testify, and say as fol-
57 lows, viz:

Interrogatory 1st. What is your name, age, and place of residence, and how long have you resided in Wayne county?

Answer. Ezra T. Hall; age, fifty-two; residence, Fairfield, Ill.; have resided in Wayne county, Ill., twenty-six years.

Int. 2nd. State if you are one of the defendants in the above-entitled cause.

Ans. I am.

Int. 3rd. State if you purchased of the complainant Cloyd any lands involved in this suit since the decree has been rendered therein. If so, state the number of acres and the price paid and about the date of said purchase.

Answer. I purchased six hundred and forty (640) acres and paid five hundred (500) dollars; it was after the decree was rendered.

Int. 4. State in what section this land is situated.

Answer. Section ten (10), town. three (3) south, range seven (7) east, in Wayne county, Ills.

Int. 5. State if these lands were of any more value to you at the commencement of the suit against you than at the date of purchase of Cloyd.

Answer. They were not, that I knew of.

E. T. HALL.

Subscribed and sworn to before me by the said E. T. Hall this 30th day of Sept., 1890.

W. H. VANDEWATER,
Notary Public.

And on this same day comes ROB'T P. HANNA, a witness of the defendants, who being first duly sworn, on his oath deposes and says:

Int. 1st. State your name, age, place of residence, and how
58 long have you resided in Wayne county, Illinois.

Answer. Robert P. Hanna; fifty-five; Fairfield, Illinois; have resided in Wayne county, Illinois, thirty-five years.

Int. 2nd. What, in your opinion, is the value of the lands involved in this suit?

Answer. From one to two dollars per acre, not including the improvements.

Int. 3. State, if you know, who have made the improvements on the lands involved in this suit.

Answer. The defendants.

R. P. HANNA.

Subscribed and sworn to before me by the said R. P. Hanna this 30th day of Sept., 1890.

WM. H. VANDEWATER,
Notary Public.

59 UNITED STATES OF AMERICA, }
Southern District of Illinois. }

I, Wm. H. Vandewater, a notary public in and for the county of Wayne, in the State of Illinois, do hereby certify that the reason for taking the foregoing deposition is and the fact is the witness is material and necessary in the cause in the caption of the said deposition named, and that he resides more than one hundred miles from the place where the court is held and the cause submitted and would not be in attendance thereat.

I further certify that notification of the time and place of taking the said deposition, signed by the att'y for said motion, was by me ordered to be served on the said Ezra T. Hall & R. P. Hanna to be present at the taking of the deposition and to testify in the matter thereof.

I further certify that on the 30th day of September, in the year of our Lord one thousand eight hundred and ninety, I was attended by H. Tompkins, att'y for defendants, and E. Beecher, att'y for plaintiffs, and by the witnesses, who are of sound mind and lawful age, and the witnesses — by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions by me reduced to writing in the presence of the witnesses, and after carefully reading the same to the witnesses — subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of forwarding the same with my own hand to the clerk of the circuit court of the U. S. for the southern district of Illinois, the court for which the same were taken.

And I do further certify that I am not of counsel nor at-
60 torney for either of the parties in the said deposition and caption named nor in any way interested in the event of the cause named in the said caption

In testimony whereof I have hereunto set my hand and notarial seal this 30 day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the —.

[SEAL.] WM. H. VANDEWATER,
Notary Public.

61 In the Circuit Court of the United States for the Southern District of Illinois.

MONDAY, *October 6th, A. D.* 1890.

Present: Hon. William J. Allen, district judge.

JAMES C. CLOYD *v.* SAMUEL MUNDY, WILLIAM SANDLIN, HENRY T. Garrison, Samuel Garrison; Joseph White, William White, and Martha J. Wheeler, Heirs of Richard White, Deceased; James B. Manahan, William F. Bain, William Shaeffer, E. T. Hall, Elizabeth E. Slover, F. M. Burgess, Adam Osterman, William J. Osterman, and Samuel Sparks.	In Chancery. Consolidated Cause.

This day this cause came on to be heard upon motion of defendants to set aside the decree herein and to dismiss this cause for want of jurisdiction, and the court, having heard argument of counsel and being sufficiently advised, overrules said motion.

62 In the Circuit Court of the United States for the Southern District of Illinois.

TUESDAY, *January 19th, A. D.* 1892.

Present: Hon. William J. Allen, district judge.

JAMES C. CLOYD *v.* SAMUEL MUNDY, WILLIAM SANDLIN, HENRY T. Garrison, Samuel Garrison; Joseph White, William White, and Martha J. Wheeler, Heirs of Richard White, Deceased; James B. Manahan, William F. Bain, William Shaeffer, E. T. Hall, Elizabeth E. Slover, F. M. Burgess, Adam Osterman, William J. Osterman, and Samuel Sparks.	In Chancery. Consolidated Cause.

This day this cause came on to be heard upon petition of defendants for a rehearing of motion to set aside the decree herein and to dismiss this cause for want of jurisdiction, and the court, having heard argument of counsel, denies said petition for a rehearing.

63 In the Circuit Court of the United States for the Southern District of Illinois.

FRIDAY, *May 27th, A. D.* 1892.

Present: Hon. William J. Allen, district judge.

JAMES C. CLOYD
vs.
SAMUEL MUNDY *et al.* } In Chancery.

This day came the defendants, by H. Tompkins, Esq., their solicitor, and enter their exceptions to the order of this court entered January 19, 1892, and at same time file their petition praying an appeal from said order to the Supreme Court of the United States, and the court, being sufficiently advised, grants said appeal and allows the defendants sixty days to perfect the same.

64 In Circuit Court United States, Southern District Illinois, January Term, 1892.

J. C. CLOYD, J. B. CORNELL, FERNANDO B. HANE, Lucinda A. Walker, E. H. Taylor, C. T. Austin, H. M. Alexander, Chas. Coe, J. Sargeant Smith, A. F. Gould
v.
M. M. WHEELER *et al.* } Reforeclosure.

Motion to dismiss for want of jurisdiction.

And whereas upon the hearing the court overruled the above motion, to which overruling the said motion the proponants take exception and petition the court that the same may by appeal be certified to the Supreme Court of the United States.

H. TOMPKIN,
Att'y for Def'ts & M.

And assigned for error:

1. The court erred in not sustaining def't-' motion.

2nd. The court erred in not sustaining def't-' motion and dismissing the suit.

65 UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the mandate from the Supreme Court of the United States filed in my office on the 2nd day of June, 1890, and proceedings thereon thereafter had, together with evidence therein thereafter filed, in a certain consolidated cause wherein James C. Cloyd is complainant and Samuel Mundy, William Sandlin, Henry T. Garrison, Samuel Garrison; Joseph

White, William White, and Martha J. Wheeler, heirs of Richard White, deceased; James B. Manahan, William F. Bain, William Shaeffer, E. T. Hall, Elizabeth E. Slover, F. M. Burgess, Adam Osterman, William J. Osterman, and Samuel Sparks are defendants, as truly and completely as the same appear of file and record in my said office.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and seventeenth year.

JAMES T. JONES, *Clerk.*

66 *Errors Assigned.*

Questions submitted to be certified:

1. Is this cause, on being redocketed under the mandate of the supreme court dismissing the appeal for want of jurisdictional amount, at issue *in fierie*, and has the court jurisdiction to consider a motion to dismiss the suit for want of jurisdiction?

2nd. With the facts as appearing of record and proof filed to sustain the motion to dismiss for want of jurisdiction, is it not the duty of the court to consider such facts and proof, and, if it appears that the court has no jurisdiction for want of proper parties or of the subject-matter, to dismiss the suit?

The court having held in the negative, the same is assigned for error.

H. TOMPKINS,
Att'y for Appellants.

[Endorsed:] Errors assigned in the record.

Endorsed on cover: Case No. 15,320. S. Illinois C. C. U. S. Term No., 235. M. M. Wheeler *et al.*, appellants, *vs.* J. C. Cloyd *et al.* Filed May 17th, 1893.

Office Supreme Court U. S.
FILED.
MAR 31 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 235.

M. M. WHEELER ET AL., APPELLANTS,

vs.

J. C. CLOYD ET AL.

APPEAL FROM THE CIRCUIT COURT FOR SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLEES.

E. BEECHER,
Attorney for Appellees.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

M. M. WHEELER ET AL.

vs.

J. C. CLOYD ET AL.

APPEAL FROM THE CIRCUIT COURT FOR SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF APPELLEES.

STATEMENT.

Originally the case No. 235 of Wheeler et al. vs. Cloyd et al. was composed of eleven separate cases, as follows:

J. C. Cloyd, J. B. Cornell, Fernando B. Hane, Lucinda A. Walker, Elizabeth H. Taylor, William Rolston, F. M. Alexander, Charles Coe, C. T. Austin, J. Sargeant Smith, Arthur J. Gould, each one being a separate suit and against different defendants. See pages 2 and 12 of printed record.

These cases being identical as to the question involved, they were, by the order of the circuit court, consolidate, and tried as one case under the title of Wheeler et al. vs. Cloyd et al.

These eleven suits were brought by complainants below (Appellees in the present case) to foreclose a certain mortgage. A decree of foreclosure was rendered in each, from which decrees defendants below (Appellants) took an appeal to this court; that appeal was heard in this court at its October Term, 1889, and on April 7, 1890, the appeal was dismissed. See a very full report of the case, under title of Wheeler vs. Cloyd, 134 U. S., page 537.

Afterwards Appellants filed, in the office of the circuit court at Springfield, Ill., a mandate from this court, in the usual from, and then filed in said circuit court a motion to dismiss all of said eleven cases, for the reason as they alleged, that the circuit court had no jurisdiction, stating as the reason for such want of jurisdiction that the transfer of the lands involved in suit was colorable only, and made for the fraudalent purpose of giving the U. S. Court jurisdiction. To this complainants interposed the objection—that this case having been finally ended in that court, and appealed to the supreme court that court had no longer power to do anything in the case This view was sustained by the court, and the motion of defendants below to dismiss was overruled. From that decision defendants below attempted to appeal to this court, but no appeal bond has been filed.

On this statement, as shown by the record, we present, on behalf of Appellees, the following points and authorities:

1ST.—When a case has been finally disposed of by a court, its power is at an end, and no further order can be made by the court. It is almost an insult to the court to cite authorities in support of this proposition. As our opponents *seem* to think we are mistaken, we refer to the following decisions of this court:

Cameron v. McRoberts, 3 Wheaton, 591.
Exparte Sibbald v. U. S., 12 Peters, 488.
Phillips v. Negley, 117 U. S., 665, 674.
Bronson v. Schulten, 104 do. 410.
Bank of U. S. v. Moss, 6 Howard, 31.
McMicken v. Perin, 18 do. 507.

The language of this court on this subject has been uniform. Thus, in Cameron v. McRoberts, 3 Wh., 591. It is certified: "That in this case the court had not power over its decree, so as to set the same aside, on motion, after the expiration of the term in which it was rendered."

And in Bronson v. Schulten, 104 U. S., 410: "During the term when it is rendered or entered of record, a judgment or order, however, conclusive in its character, is under the control of the court pronouncing it, and may then be set aside, vacated, or modified. After that term, unless steps be taken during its continuance, by motion or otherwise, errors in a final judgment can only be corrected in an appellate court."

Again, in Exparte Sibbald v. U. S., 12 Peters, 488: "Though this court, after the term has closed, may correct a clerical mistake in a decree, or reinstate a case dismissed by mistake, it cannot alter, or annul a decree or judgment."

Bank of U. S. v. Moss, 6 H., 31: "After a circuit court has adjourned without day, it cannot set aside one of its own judgments upon motion, even for want of jurisdiction over the cause; the judgment is binding till reversed on error."

McMicken v. Perin, 18 H., 507: "Circuit courts have no power to set aside, on motion, their decrees, after the term at which they were rendered."

In Phillips v. Negley, 117 U. S., on page 674, this court cites numerous authorities, and uses language stronger than the citation above.

In the courts of Illinois, from which State this case comes, the decisions are the same:

Becker v. Sauter, 89 Ill., 596.

Cook v. Wood, 24 do, 295.

It is a well settled principle that affidavits used on a trial are no part of the record unless preserved by bill of exceptions, or in some other manner provided by the law. The fact that the clerk has copied them into the record does not make them a part of the record. Strike from this record the affidavits and there is nothing left for the court to act on.

But there are other answers, fatal to Appellant's case. From an inspections of the record alone it is impossible to tell what this case is about. We who are connected with it know, but we must get our information from other sources than this record.

Again, while this case is entitled Wheeler et al. v. Cloyd et al., it is in fact made up of eleven distinct cases, each one having different complainants and different defendants—all involving substantially the same questions but different lands, and therefore ordered by the court to be consolidated and heard as one case. The allegation attempted to be made by Appellants is that complainants obtained their title by fraud, and for the purpose of giving the U. S. court jurisdiction. As to the cases in which C. T. Austin, J. B. Cornell, and Elizabeth H. Taylor, and all the others except J. C. Cloyd, F. B. Hane, and L. A. Walker were complainants, there is no attempt to charge fraud. Nor is there any evidence in the cases of J. C. Cloyd and Lucinda A. Walker. Yet this motion of Appellants applies to all, and the attempt to appeal includes all. If no other reason were shown this alone would defeat this case.

There is another valid defense. This record does not show that the affidavits contained in the record were the only evidence heard by the court. Unless this is shown it will al-

ways be presumed the court had evidence before it sufficient to sustain the finding.

If we are allowed to refer to matters outside of this record, we would say, that by an examination of the printed record when this case was formerly before this court (Wheeler v. Cloyd, reported in 134 U. S., page 537) they will find on pages 163 and 164 of that record, in the answers of the defendants, filed by the same attorney who is now prosecuting this appeal, the very same matters set up in defense that are now set up in this motion. They will also find on page 332 of such printed record, the 12th assignment of error is for same cause. That assignment reads as follows: "It was error to retain jurisdiction after a fraudulent transfer was shown to have been made to give jurisdiction."

The motion filed in this case which is the basis of the present proceeding was filed at June Term, 1800, of the circuit court at Springfield, Ill. See page 2 of printed record. That motion was overruled by the court on October 6, 1800. See page 31 of printed record. Afterwards on January 19, 1892, fifteen months after the last order was made, a petition for re-hearing was presented, which on same day was overruled. See page 31 of printed record. From this last decision in refusing a re-hearing this appeal was attempted to be taken. See page 32 of record.

When this last order was made it had been off the docket for fifteen months. Three terms of court had intervened between the time of overruling the original motion and the motion for re-hearing, and no steps taken to continue the case. At that late day the circuit court had no power to enter any order.

In conclusion, we repeat:

1st.—The circuit court had no power to do anything in the case after the adjournment of the court for the term.

2nd.—There is nothing shown by this record from which any one could appeal.

3rd.—If there were, the record does not contain the evidence so as to show whether the decision was right or wrong.

4th.—The matter was fully heard on the former trial by the circuit court, and parties are estopped from renewing it.

5th.—If parties have any remedy, it can only be by a bill in chancery, and not on motion.

E. BEECHER,

Attorney for Appellees.

Office Supreme Court U. S.
FILED.
APR 2 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 235.

M. M. WHEELER, et al,

Appellants,

vs.

J. C. CLOYD, et al,

Appellees.

Brief and Points for Executors of John B. Cornell, Appellees; On Motion to Dismiss Appeal, and on the Merits.

J. C. CLAYTON,
Of Counsel for JOHN B. CORNELL, Appellees.
No. 227 Broadway,
New York City.

C. B. MERWIN, 218 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 235.

M. M. WHEELER, *et al*,
Appellants,

vs.

J. C. CLOYD, *et al*,
Appellees.

Brief and Points for Executors of John B. Cornell, Appellees. In cases as consolidated.

(The references are to the original or marginal pages of the Record.)

This case comes before this Court on appeal from an order denying a motion for a rehearing of a motion to set aside a decree rendered by the Circuit Court of the United States for the Southern District of Illinois, recovered by the appellees against the appellants, in certain consolidated cases instituted and consolidated as hereinafter set forth, and to dismiss the cause for want of jurisdiction. (pp. 61 to 65).

First.

The following is a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

I.

Prior to April, 1859, the County of Wayne in Illinois had become the owner in fee of about 100,000 acres of land situated in that County. The title of Wayne County to such lands is conceded by all the parties to this controversy to have been good; all said parties deriving from the County their alleged titles to the lands in question herein.

II.

The Legislature of Illinois, by Act approved Feb. 15, 1855, chartered a corporation called the Mt. Vernon Railroad Company; and on the same day chartered a corporation called the Belleville and Fairfield Railroad Company. By Act passed Feby. 14, 1857, the charter of the last mentioned Company was amended, its line of road was extended, and its name was changed to the St. Louis and Louisville Railroad Company.

III.

On April 20, 1859, S. J. R. Wilson and T. M. Scott, acting as the Judges of the County Court of Wayne County, and claiming authority so to do under certain votes and proceedings of that County, executed to Isaac Seymour of New York City, a deed of trust and also a mortgage, both bearing date on that day, and which were on May 3rd, 1859, filed for record and recorded in the Office of the Clerk of the Circuit Court and *ex officio* Recorder of said Wayne County.

IV.

On March 7, 1865, (Seymour having previously departed this life) John W. Kennicott, and others, as Complainants, and claiming to be holders of some of the bonds secured by such deed of trust and mortgage,

filed their bill in chancery in the Circuit Court of the United States for the Southern District of Illinois, against the County of Wayne and the Mt. Vernon Railroad Company as defendants, for the foreclosure of said mortgage and deed of trust.

V.

The Mt. Vernon Railroad Company suffered default, and the bill was taken *pro confesso* against it on June 1, 1868. A decree of foreclosure and sale was rendered June 18, 1868, on the Master's report, directing a sale of the railroad, with the Company's real estate, &c., &c. The Master made the sale, and reported the same to the Court. Exceptions to the report were overruled, and the report confirmed and approved.

VI.

The County of Wayne, on Dec. 7, 1870; interposed its answer to the bill as amended. Such answer in substance traversed all the allegations of the amended bill, and put complainants to proof thereof.

VII.

On Jan. 2, 1871, after a hearing upon pleadings and proofs, the Circuit Court rendered a decree, that complainant's bill be dismissed, with costs, on the ground that the proofs failed to show that at the date of the mortgage and deed of trust there was any line of railroad constructed or authorized to be constructed through Wayne County, with which the Mt. Vernon Railroad was joined, connected or intersected.

The complainants thereupon prayed an appeal to the Supreme Court of the United States.

VIII.

Such appeal was heard in this Court at the December Term, 1872, and the decree appealed from was reversed and a new trial ordered; the case being reported as Kennicott vs. The Supervisors of Wayne County, 16 Wall., 452.

In the statement of that case, pp. 453–462, the charters of the Mt. Vernon RR. Co. and the Belleville and Fairfield RR. Co. and the amendment thereto, and the proceedings of the County of Wayne thereunder, and the material parts of the deed of trust and mortgage are set forth with sufficient fullness, and are here referred to as a part of this statement of facts.

IX.

Further testimony was taken in the Circuit Court. After an interlocutory decree, and a reference to the Master, a final decree was rendered by the Circuit Court in June, 1874. For case as reported, Kennicott *vs.* The Supervisors of Wayne County, see 6 Bissell, 138.

X.

From that decree another appeal was taken to this Court, where in Oct., 1876, it was affirmed. Supervisors *vs.* Kennicott, 94 U. S., 498.

XI.

After such affirmance, and pursuant to the provisions of the decree of June 25, 1874, as affirmed, John A. Jones, Master in Chancery, on Sept. 18th, 1877, sold the said lands to Taylor, Glenn, Goodwin, Broadwell and Crooks, as Trustees for the parties and beneficiaries in the deecree named and provided for.

XII.

The time allowed for redemption from the sale having

expired, and the lands not having been redeemed, the Master, on May 27, 1879, executed and delivered to Broadwell, to whom all the certificates of purchase of the lands so sold had been transferred, a deed for the lands so sold, which sale and conveyance were reported to and approved by the Court.

The proceeds of such sale, after deducting the costs of suit and expenses of sale, only amounted to about $620,000, leaving of the principal of the decree unpaid over $500,000, and interest.

XIII.

Thereupon, through and by proper and legal conveyances made by Broadwell and his grantees, the appellee, James C. Cloyd, became the owner of the lands described in the schedule to his supplemental bill, the amount for which each parcel was sold by the Master being stated in the last column of Exhibit A, and none of said parcels of land bringing at the said sale more than $480.

XIV.

On Jan. 25, 1882, Mr. Cloyd filed in the U. S. Circuit Court for the Southern District of Illinois his supplemental bill in Chancery for the enforcement of the rights acquired by such sale, purchase and conveyance; joining as defendants therein Samuel Mundy and others, who were in possession of the land so owned by him by title derived under said foreclosure and sale.

XV.

On Jan'y 25, 1882, Chauncey T. Austin filed a like bill in Chancery in the same Court against Michael Book and others, with like allegations and schedules.

XVI.

On Jan. 25, 1882, John B. Cornell filed a like bill in

Chancery in the same Court against Thomas J. Pettyjohn and others, with like allegations and schedules.

Edwin Beecher, of Fairfield, Ill., was solicitor for the complainants in these three cases.

XVII.

On Jan. 26, 1882, Elizabeth H. Taylor, Henry M. Alexander, as surviving Executor, &c. and others, by H. C. Whitney, their Solicitor, filed in the same Court their bill of complaint, setting forth in substance the same allegations as in the three bills already referred to, and praying for substantially like relief: The statements of the land, however, being set forth in the bill itself, and not in schedules annexed thereto, as in the other three bills.

XVIII.

On Jan. 2, 1884, an order was made in the Circuit Court, consolidating the four cases of Cloyd, Austin, Cornell and Taylor, above referred to, and directing that they thereafter progress as one cause under the title of the first cause; and leave was given to amend the bills in all of the cases to make the same harmonious.

XIX.

On April 4, 1884, Fernando B. Hane, on petition, and order granting leave, filed his intervening petition, claiming to be grantee of said Broadwell for portions of the lands so sold, and claiming in substance the same relief as in the bills to which he intervened, and additional relief by way of injunction.

XX

To these bills and this petition, either before or after consolidation, various defendants interposed demurrers, and filed answers and pleas and answers.

The principal answer sets up among other things, in substance, the same facts upon which as a cause of action, the Supreme Court of Illinois, in Scates *ex.* King, 110 Ill., 458, affirmed a decree rendered in the Circuit Court of Illinois for Wayne County, setting aside a conveyance to Walter B. Scates under the foreclosure of a portion of the mortgaged lands as a cloud upon complainant's title.

Replications were filed.

XXI.

On leave duly granted to the various parties, amended bills or intervening petitions were filed as follows: by W. L. Rolston; by James C. Cloyd; by Lucinda A. Walker.

XXII.

Proofs having been taken by the respective parties, complainants and defendants, the case was brought to hearing on pleadings and proofs, and on Jan. 25, 1886, the decree was rendered.

The facts are found as follows:

1. That on April 20, 1859, Wayne County, being the owner of the lands, &c. executed, &c. the mortgage and trust deed to Seymour.

2. That the trust deed and mortgage provided that, on default of payment of interest, the entire debt became thereby due.

3. That between April 20, 1857, (the date of the deed and mortgage), and March 11, 1865, Wayne County sold its equity of redemption or residuary interest of, in and to sundry tracts of the same lands which had theretofore been conveyed by the mortgage and trust deed to Seymour, to sundry persons specified in the decree.

4. That the (original) bill, (of Kennicott and others,

supra) was filed March 7, 1865, in the U. S. Circuit Court, against Wayne County and the Mt. Vernon Railroad Company, as the only defendants thereto; that Wayne County was duly served with process and appeared in Court, new parties being made from time to time, and filed its answer, and after trial and appeal to the U. S. Supreme Court, on June 25, 1874, a decree of foreclosure was duly entered in the Circuit Court against the County, and all said lands or such parts thereof, &c. were ordered to be sold at a decretal sale by the Master in Chancery; that the decree was appealed from to the U. S. Supreme Court, and there affirmed; and the premises were sold by the Master on Sept. 18, 1877, in separate parcels, according to the legal sub-divisions, and all the tracts were purchased at such sale by Goodwin and others, in separate tracts and in detail, according to the requirements of the decree; and that under the terms of sale as ordered by the decree a redemption, as provided by the statue of Illinois for judicial sales, was allowed to the County of Wayne; that none of the tracts were redeemed from said sale; and that at the expiration of the time of redemption the Master executed a deed for all of said tracts of land to Norman M. Broadwell, who was the assignee of the said certificates of purchase of the lands at such sale.

5. That none of the parties so purchasing the equity of redemption or residuary interest of Wayne County between April 20, 1859, and March 11, 1865, were made parties to the suit to foreclosure; nor did they appear in any way to the suit.

6. That on the hearing of said bill there was then due of principal and interest on the construction bonds the sum of $1,118,734.71; and that the lands embraced in the mortgage and trust deed were ordered to be sold, or so much as might be necessary to produce that amount; and that at such Master's sale the total amount realized was $620,160.40, leaving unpaid and unprovided for by the sale a deficit of $498,574.91.

7. There is then in the decree exhibited and shown a list or schedule of lands involved in the consolidated suit, and specified in said bills of complaint, with the names, respectively, of the several and respective persons to whom the County of Wayne sold its equity of redemption; and, as forming part of said list and schedule, a statement of the present owners, respectively, of the title acquired by Goodwin, Taylor, Crooks, Broadwell and Glenn, and deraigned by mesne conveyances from the assignees of said parties and from said decretal sale; and as likewise forming a part of said list and schedule a statement of the amounts which were bid respectively at the said decretal sale for said tracts of land respectively.

The schedule then sets forth the lands in question in this action, by the subdivisions, sections, townships and ranges thereof; with the names of the purchasers from the County of Wayne of the equity of redemption, the present owners of such equity, the names of the complainants who are owners of the title to the respective tracts acquired at the decretal sale; together with a statement as to each of the tracts, of the amount at and for which the same was bid off at such decretal sale.

XXIII.

As matters of law it is then decreed:

1. That the opinions and decisions of the U. S. Supreme Court on the appeals heretofore prosecuted from the Circuit Court, and reported in 16 Wall., 452, and 94 U. S., 498, are binding on the Court, and there is nothing in the Record or evidence in the case as consolidated to invalidate the mortgage and deed of trust or the respective amounts found due the several parties to the suit as consolidated. Both the findings as to said several amounts so found due should be sustained.

2. The purchasers from Wayne County, after the re-

cording of the mortgage, took the lands purchased by them severally subject to the lien of the mortgage, and the proceedings to foreclose the trust deed and mortgage did not release or discharge this lien, so long as the mortgage debt remained unsatisfied.

3. The purchasers from the County, both after the recording of the mortgage, and after the service of process on Wayne County on March 11, 1865, cannot acquire tax titles as against the mortgagees or those acquiring title under the foreclosure sale.

4. That the Master's deed under the decretal sale of Sept. 18, 1877, transferred to the several purchasers thereat an equitable right to so much of the mortgage debt as was bid upon each tract severally.

5. That the *lis pendens* as to purchasers from the County attaches from the 11th of March, 1865, the date of the service of process on Wayne County; and that of the facts averred in the several bills and sustained by the proofs purchasers of lands at the decretal sale which were sold by Wayne County between April 20th, 1859, and March 11, 1865, are entitled to file a bill in the nature of a supplemental bill against the parties holding title from the County, subject to the mortgage, to have the lien of the mortgage enforced by a decree of foreclosure.

6. It is then adjudged and decreed that each of the owners of the equity of redemption or residuary interest of the County of Wayne, of, in and to the several tracts of land purchased from the County between April 20, 1859, and March 11, 1865, who had been already summoned or had appeared herein, or their assigns respectively, *each acting for himself or herself, and not for any other, may and shall redeem the respective tracts of land, of which they at date of service on them respectively of process or entry of appearance respectively held and owned the equity of redemption or residuary interest of the County of Wayne, within or at*

the expiration of one year from this date, by paying into Court the amount for which each of said tracts of land was bid and sold at said decretal sale, for the use and benefit of the owners respectively under title deraigned from said decretal sale of the tract or tracts so redeemed; and that the judgment creditors respectively of any such persons so owning the equity of redemption might or should redeem any tracts thereof in default of such parties so redeeming, at any time within three months of and after the said expiration of twelve months, by paying the amount so decreed to be redeemed from, in accordance with the statutes of the State of Illinois concerning redemptions from judicial sales; and also that the decree of foreclosure of June 25th, 1874, hereinbefore referred to, should be vacated and annulled as to each and every tract, (but as to none others), thus redeemed as aforesaid; and that in default of redemption, as provided for in the decree, that then, and from the date of the expiration of such period of limitation, all rights of such owners of the said equity of redemption, or their respective assigns so failing to redeem, should be forever barred and foreclosed of their equities of redemption, and of all rights of, in and to said lands of any kind or nature adversely to the owners under title deraigned from said decretal sale; and that each and all of said defendants so being barred and foreclosed, and their agents, &c., should from and after the expiration of said fifteen months cease to exercise any acts of ownership over said lands, and should at once thereafter vacate, abandon and leave the same, and never intermeddle any further therewith under pain of being considered in contempt of Court; and that the respective titles of said several tracts of land not so redeemed should be and they are confirmed in said several parties so owning the same by title deraigned from said decretal sale as aforesaid, and their assigns; and that any tax deed or certificate to any such tract of land not thus redeemed which may belong to any such

person thus entitled but failing to redeem such tract, is hereby declared to be vacated, annulled and for nothing taken hereafter.

Costs are then declared to be adjudged against and distributed among the claimants under the equity of redemption or residuary interest of the County of Wayne who have been summoned in the case, or have entered voluntary appearance therein, in proportion to the respective amounts so required to be paid by them respectively to redeem hereunder, whether they redeem or not, except that each party defendant shall be taxed costs of service on him or her; and that several executions issue therefor against defendants respectively; and that the cause be continued for the report of the Master in Chancery on all matters referred to him therein.

XXIV.

Thereupon, at the Jany. Term, 1885, the respondents presented their petition for a rehearing of the said decree, the first cause assigned for the rehearing being "that the result of the decree in said cause would be a great hardship to the respondents, as there is not enough in amount in any case to allow an appeal."

In very tender consideration of the rights of defendants, and lest some error should have intervened in a decree which would not be subject to review upon appeal, the case was again carefully considered by Judges Treat and Blodgett, sitting together for that purpose, and on March 29, 1886, the motion for a rehearing was denied.

Even after this full reconsideration, the motion for a rehearing was opened and continued until the next Term. It was then renewed before the same Judges, Mr. Justice Harlan, the Circuit Justice, sitting with them, because of the conceded non-appealability of the decree. It was by them again heard, and was, on June

10, 1886, denied on the merits, and the decree of March 29, 1886, affirmed.

XXV.

Thereupon, on July 13, 1886, some of the defendants prayed an appeal from the final decree, to operate as a *supersedeas*, which seems to have been allowed on their entering into a bond to complainants in $5,000, conditioned, &c.

On August 5, 1886, defendants who had prayed the appeal, filed their petition for severance from the defendants refusing to join in the appeal and filed their appeal bond.

Thirteen distinct clauses appear in the Assignment of Errors on that appeal.

Among which are the following:

4th. The petitions for rehearing should have been granted.

6th. That on the facts as alleged by the complainants it is shown that the Court had no jurisdiction of the subject matter, it being not cognizable in a Court of Equity.

8th. No jurisdictional amount is shown of the value of the matter in dispute as between each complainant and defendant to give the Circuit Court jurisdiction.

12th. It was error to retain jurisdiction after a fraudulent transfer was shown to have been made to give jurisdiction.

XXVI.

The appeal was argued before this Court, December, 5th, 1889, and was decided April 7th, 1890, by dismissing the appeal for want of jurisdiction.

It is reported, Wheeler vs. Cloyd, 134 U. S., 537.

The mandate of this Court appears on page 1 of the Record in the present appeal.

After filing this mandate in the Circuit Court, on June 2nd, 1890, the defendants moved the Circuit Court, on July 7th, 1890, to set aside the decree rendered by said Circuit Court, January 25th, 1886, and to dismiss the suit for the reason that the record and the facts show that the Court had no jurisdiction. See pages 4 to 11.

The motion was heard and denied in the Circuit Court on October 6th, 1890, (page 61). On January 19th, 1892, a motion for a rehearing of said motion was denied, (page 62).

The order denying the said motion for a rehearing, simply states, under date of January 19th, 1892:

"This day this cause came on to be heard upon peti-
"tion of defendants for a rehearing of motion to set aside
"the decree herein and to dismiss this cause for want of
"jurisdiction, and the Court, having heard argument of
"counsel, *denies said petition for a rehearing.*"

From this last mentioned order the defendants take the present appeal to this Court, (page 63). The appeal was allowed May 27th, 1892.

Second.

Upon these facts the following Points are presented:

FIRST POINT.

It is respectfully urged that the present appeal is taken distinctly and solely from the order of May 22nd, 1892, denying the petition for a rehearing (page 63.)

No appeal is taken from the order of October 6th,

1890, overruling the motion to set aside the decree and dismiss the cause for want of jurisdiction.

In view of this it may be said that the granting or refusal of a rehearing rests in the discretion of the Court in which the case has been heard and is not the subject of appeal.

Roemer v. Bernheim, 132 U. S., pp. 103, 106.

There is nothing in the Record to show why the Circuit Court denied the motion for a rehearing and it might well have been that they deemed, under all the circumstances of this long continued litigation, that it would be inexpedient to grant it. The Circuit Court was qualified to judge of this and there is no appeal from its decision. Moreover no petition for such rehearing appears upon the printed Record and therefore it is impossible to state when such petition was presented to the Circuit Court or what grounds were stated therein as required by the Equity Rule 88.

Also by Equity Rule 88: "No rehearing shall be "granted after the term at which the final decree of the "Court shall have been entered and recorded, if an ap-"peal lies to the Supreme Court." The same Rule or the reason thereof certainly applies to this case. If the order of October 6th, 1890 is appealable to the Supreme Court, as must be claimed by the appellants here, then no rehearing of that order should have been granted after the term of October, 1890, in which the order was entered.

The Circuit Court of the United States for the Southern District of Illinois, holds regular terms on the first Monday of January and June in each year. U. S. Rev. Stat. Sec. 658. Therefore the order above mentioned was entered in June Term 1890, and for all that appears the petition for a rehearing was not presented until the January Term in 1892, which of itself would have afforded good cause for denying the motion.

SECOND POINT.

But supposing, for the sake of argument only, that this Court upon appeal from an order denying a rehearing under the circumstances above given should consider the merits of the original order of October 6th, 1890, it is respectfully submitted that no question with respect to that order comes properly before this Court upon the present appeal.

Of course there can be no appeal in this cause except upon the question of the jurisdiction of the Circuit Court; that must be held to have been finally settled by this Court upon the last appeal.

This appeal was allowed May 27th, 1892, (page 63) and therefore was subsequent to the 1st day of July, 1891, and is governed by the provisions of Chapter 517 of Laws of 1891, passed March 3rd, 1891, relative to appeals from the U. S. Circuit Courts (26 Stat., L. 1115).

This Court has decided that the said act went immediately into effect on its enactment.

In Re Clausen, 140 U. S., 200.

If this appeal be taken under the provisions of Section 5 of that Act of 1891, then:

The questions involving the jurisdiction of the Circuit Court must have been in issue and decided against the party seeking to bring it before the Court for determination, and must be certified for decision. The rules applicable to certificates under Chapter 236, Laws of 1889, govern also certificates under the Judiciary Act of 1891, and are substantially the same rules which were applied to certificates of division of opinion under the former practice (U. S. Rev. Stat., Sec. 652, 693).

Shields v. Coleman, 157 U. S., 176.
Van Wagnen v. Sewall, 160 U. S., 372.
Maynard v. Hecht, 151 U. S., 324.
McLish v. Roff, 141 U. S., 661.

In the present Record, no questions are certified by the Court in any form complying with the rules established by the decisions.

We find at page 64 of the Record, two assignments of error which are substantially identical and amount to whole issue of law and fact.

This is manifestly insufficient to bring up any question before this Court according to the rule laid down U. S. vs. Bailey, 9 Peters, 267, that in considering questions certified this Court has never taken jurisdiction of a question of fact; and in law it requires the precise point to be stated, otherwise the case is remanded without an answer.

At page 66 of the Record, and subsequent to the certificate of the Clerk, appears a clause entitled "Errors assigned," and commencing "Questions submitted to be certified," followed by two clauses numbered, respectively, "1st" and "2nd," and signed "H. Tompkins, Attorney for Appellants," but this is not certified by the Court or even, apparently, by the Clerk.

In the case of The Bayonne, 159 U. S., 692, it was held that an assignment of error cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon so as to give jurisdiction under Section 5 of the Act of 1891. Also that the allowance of the appeal by the Court below cannot be treated as a certificate. Also that the certificate must be granted during the term at which the judgment or decree is entered; and that it cannot be filed *nunc pro tunc*.

See also Colvin vs. Jacksonvile, 158 U. S., 457.

It is respectfully urged that in the light of the above decisions the supposed questions at the end of the printed case are in every way insufficient, and raise no point of law to be determined by this Court.

Moreover even though this Court could recognize matters so improperly presented, the supposed questions themselves are insufficient. For the 1st does not appear from the Record to have been in issue or decided in the Circuit Court; nor does it limit any time within which the Circuit Court should have the right to consider a motion to dismiss the suit for want of jurisdiction.

The 2nd supposed question asks this Court to consider the facts and proofs for the purpose of deciding whether it was the duty of the Circuit Court to decide the motion differently from the way it did. For there is nothing in the record to show that the Circuit Court did not fully consider all the facts and proofs before it when it decided the motion.

POINT SECOND.

Stress may be laid by appellants upon its appearing by the record (page 6) that a motion was made to dismiss the suit as to certain parties on October 3rd, 1885, upon which no separate order appears to have been entered. But surely this motion was effectually decided and brought to an end by the final decree entered January 25th, 1886, and the refiling of it on July 7, 1890, can give no further potency than if it had been originally filed at the last mentioned date.

Moreover it appears from that very motion filed before the final decree, that all the facts relative to alleged collusive transfers to give jurisdiction to the United States Court, which are attempted to be presented in this appeal were known to appellants before the final decree of January 25th, 1886, and must be presumed to have been considered by the Circuit Court in rendering that decree.

POINT THIRD.

On the last appeal to this Court it was expressly assigned for error that "no jurisdictional amount is shown of the value of the matter in dispute as between each complainant and defendant to give the Circuit Court jurisdiction."

This question therefore must have been considered by this Court upon that appeal and should not be now reopened. Likewise it was then also assigned for error that "it was error to retain jurisdiction after a fraudulent transfer was shown to have been made to give jurisdiction."

These points cover practically all the points raised by defendants in their motion to dismiss the suit filed July 7th, 1890. (See pp. 4 to 7.)

POINT FOURTH.

The Circuit Court clearly had jurisdiction of the several bills of the appellees.

Such bills were simply supplemental bills, to carry into complete effect the previous decrees of the Court affirming the rights of the holders of the bonds secured by the original mortgage and trust deed.

All the bills which by order of January 2nd, 1884, of the Circuit Court were consolidated, were in form purely supplemental bills to carry into full effect the decree in the original foreclosure suit. The bill of Taylor, Alexander and others against Bozarth expressly prayed that it be taken as supplemental to the original bill in the Kennicott case. And by the consolidation that part of this bill became a part of all the other bills.

The Court below properly held

"That upon the facts averred in the several bills and sustained by the proof," the several complainants in the supplemental bills as "the purchasers of lands at the decretal sale, which were sold by Wayne County between April 20th, 1859, and March 11th, 1865, are entitled to file a bill in the nature of a supplemental bill against the parties holding title from the County, subject to the mortgage, to have the lien of the mortgage enforced by a decree of foreclosure."

It needs no argument to establish that every Court has jurisdiction and power by supplemental proceedings, whether in the form, or under the name of a supplemental bill, or of a petition or other proceeding at the foot of its former judgment or decree, to carry the same into full effect, and to afford to all the parties entitled thereunder the relief which the Court has already adjudged to them.

Dewey v. W. Fairmount, Co., 123 U. S., 329.
Kuffendorf v. Hyde, 110 U. S., 276.
Pacific R. R. Co. v. Miss. P. R. R. Co., 111 U. S., 505.
Clark v. Matthewson, 12 Pet., 164–172.

POINT FIFTH.

The decree also properly held that the Master's Deed under the decretal sale transferred to the several purchasers thereof an equitable right to so much of the mortgaged property as was bid for each tract separately.

No argument is required to show that when a party at a sale of mortgaged premises under the decree of a Court of Eqnity, purchases a part thereof at a specified sum,

paying over that sum through the Court to the mortgagee, and receiving the conveyance from the Court through its officer, if the title acquired for any reason proves incomplete or defective, or requires further action of the Court to assure to the purchaser what he believed he was purchasing and what the Court undertook to sell; the purchaser acquires by subrogation a several and distinct equitable right to so much of the mortgage debts as he has satisfied by the payment of his purchase price, and also an equitable interest in the land conveyed to him. The Court, if the defect in the title be one in regard to the manner of proceeding, has the power and is under the duty to perfect, upon a hearing of the parties, the subrogated right so acquired, and that hearing may be had by a supplemental bill, or other proceeding of that character, upon the foot of or based upon the original decree, and wherever there was jurisdiction to render the original judgment, there is jurisdiction in the same Court, by proper proceeding, to make effectual the original adjudication.

POINT SIXTH.

There was no fraudulent transfer of title, nor was the jurisdiction of the Circuit Court to render the decree in question acquired thereby, or by any wrongful act, transfer or proceeding whatever.

McDonald v. Smolley, 1 Peters, 620.
Smith v. Kernochen, 7 How., 198.
Van Dolsen v. New York, 17 Fed. Rep., 817.
Lehigh Mining & Manuf'g. Co. v. Kelly, 160 U. S., 327.

POINT SEVENTH.

No pretense is made of any collusive assignment or conveyance in the case of John B. Cornell who was the sole complainant in one of the four suits consolidated by order of the Circuit Court made Jannary 2d, 1884, nor yet in case of C. T. Austin sole complainant in another of said four suits, nor yet in case of Elizabeth H. Taylor and others, complainants in still another of said four suits, nor yet as to James C. Cloyd, respecting the cause of action set up in his original bill.

Fernando B. Hayne and Lucinda A. Walker were introduced into said suit by intervening petition and James C. Cloyd also filed an intervening petition whereby he added to the lands set forth in his original bill those alleged afterward to have been conveyed to him by Walter B. Scates. These intervening petitions were all filed after the entry of the consolidation order. Surely justice required that any plea to the jurisdiction as against these intervening petitioners should have been set up at the time, or at all events that it should not be suffered to be set up long after the final decree to the prejudice of the original complainants in the four suits which were consolidated.

POINT EIGHTH.

The present appeal should be dismissed with costs, or if the Court proceed to an examination of the merits, the order appealed from should be affirmed with costs.

J. C. CLAYTON,
Of Counsel for MINNIE R. S. CORNELL,
and others Executors of JOHN B.
CORNELL, deceased.
No. 227 Broadway,
New York City.

No. 235.

IN THE

SUPREME COURT OF THE U. S.,

OCTOBER TERM, A. D. 1895.

M. M. WHEELER, et al.
vs.
JAMES C. CLOYD, et al.

Appeal from Circuit Court, U. S., for Southern District of Illinois,

BEING CERTIFIED UP UNDER APPELLATE COURTS ACT, MARCH, 1891, ON QUESTION OF JURISDICTION.

ACTION, RE-FORECLOSURE.

STATEMENT AND BRIEF OF APPELLANTS.

H. TOMPKINS, Attorney for Appellants.

PRESS STEAM PRINTING HOUSE, FAIRFIELD

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ACTION, RE-FORECLOSURE.

STATEMENT AND BRIEF.

This cause is now before the Court, being certified up by the circuit court under "appellate court act, March 3, 1891," which provides, "In any case in which the jurisdiction of the Court is in issue in such cases the question alone shall be certified from the Court below for decision."

The cause was before this Court by appeal taken to

the October Term, 1886, and submitted in December, 1889. Decision filed ——1870, and reported in 134, U. S. Reports page 537, dismissing the appeal as it appeared from the record that none of the appellants had in controversy the value to exceed $5,000. and remanded for the Court "to proceed as right and justice demanded under the laws of the United States this appeal notwithstanding." Under said mandate the cause was redocketed at the June Term, 1890. Whereupon the Defendants (The Appellants) renewed their motion to dismiss the suits for want of jurisdiction as insisted upon in the original proceedings by demurrer, pleas, answers, and motion.

QUESTIONS INVOLVING JURISDICTION.

1st. Is the causes on redocketing under mandate from supreme court in *fiere?*

2nd. If so, were the parties complaints improperly and collusively made for the purpose of creating a case cognizable by the circuit court of the United States?

3rd. That no amount in value is alleged or shown to give the court jurisdiction.

4th. That the facts stated on which action is based show no right for relief in a Court of Equity.

5th. That the action, if any, should be by each complainant against each defendant.

PROCEEDINGS OF RECORD, JUNE TERM, 1890, ON REDOCKETING THE CAUSE.

Motion by Defendants with affidavits and depositions to dismiss suit for want of jurisdiction.

"Now comes defendants by their attorney, H. Tompkins, and enter this, Appellants' motion, in the above entitled cause, that the Court set aside and render null and void the proceedings and decree had herein, and dismiss the suit for want of jurisdiction.

1st. That the Court had no jurisdiction of the subject matter nor of the parties.

2nd. That the jurisdiction was ambiguous and obscure. That the jurisdiction of the Court over the parties was had by the collusion, with false allegations asserted.

3rd. That the Court was imposed upon in taking jurisdiction in said cause by fraudulent acts of Fernando B. Hane, Lucinda A. Walker and J. C. Cloyd, 2nd bill the nominal complainants, ~~that~~ and H. C. Whitney ~~that~~ and Walter B. Scates, who appear as their attorneys, and who were residents and citizens of the State of Illinois, and the real parties in interest.

4th. That the attorneys so named were the owners of the subject matter in dispute at the time and after the suit was commenced.

5th. That the said H. C. Whitney and Walter B. Scates, being the real parties in the interest, conveyed to said F. B. Hane, Lucinda A. Walker and J. C. Cloyd, without consideration and for the sole purpose reciting that they were residents and citizens of other States, and that their names as complainants are but nominal and used for the purpose of jurisdiction without having or had any interest in the subject matter in controversy. That no com-

plainant has as against any defendant demanded, prayed or decreed, an amount in controversy of value to exceed $500. That no amount was alleged as required by law to give jurisdiction. That the amount to give jurisdiction as stated was ambiguous and obscure, and this they are ready to verify.

Therefore they pray the judgment of the Court will take no further cognizance or sustain the further action aforesaid.

H. TOMPKINS, Attorney for motion.

Subscribed and sworn to before me, July 7th, 1890.

JAMES T. JONES, Clerk.

Notice having been given, the defendants now resume their motion, pending in the original cause, for dismissal based on demurrer, pleas, answers, affidavit, and with the motion as appears on page 171, printed record, of the cause remanded, filed October 3, 1885, as follows:

Now come the respondent by their attorneys, James McCartney and H. Tompkins,—file this their motion to dismiss the suit as to all parties claiming or holding title conveyed to them since the commencement of this suit, to-wit: January, 1882, by Walter B. Scates and H. C. Whitney, and for cause state that H. C. Whitney and Walter B. Scates are and were residents of the State, and that the transfer of the said title was made alone, and by each, and for the purpose that the said parties, to-wit: Lucinda A. Walker, Fernando B Hane and J. C. Cloyd, who claim to be non-residents and now are the real complainants in this

cause, received their title from the said H. C. Whitney and Walter B. Scates, it being a quit-claim interest only and without any consideration paid that they might intervene in this suit and thus deprive the State court of its jurisdiction over the subject matter of the said lands.

And your respondents further state that the same was so transferred after the supreme court of the state of Illinois had decided that the said title to the said lands so held by the said H. C. Whitney and Walter B. Scates was null and void, in which said causes so heard and adjudicated by the supreme court of the state of Illinois, the said H. C. Whitney and Walter B. Scates were parties defendant thereto.

Whereupon your respondents move that this cause be dismissed.

H. TOMPKINS,
Attorney for Defendants.

Subscribed and sworn to Oct. 3, 1885.

On the above motion, Defendants on notice took depositions of F. B. Hane, Lucinda Walker, J. C. Hyde, Sarah C. Whitney, Scates heirs, E. T. Hall and R. P. Hanna, as follows:

FRAUDULENT OR COLLUSIVE CONVEYANCE.

On the above motion, not disposed of, on page 171, of remanding record, and on notice depositions were taken as follows:

F. B. Hane, one of the Complainants to interrogatory as follows makes answer:

Question. State if you are the Fernando B. Hane whose name is included in the above named parties as Complainant and if so state the circumstances and consideration by which you became such party: also, whether you have any interest in the subject matter of such controversy and what was its value.

Answer. I am the Fernando B. Hane whose name is used as Complainant. The circumstances of my becoming such Complainant was Walter B. Scates, who lives in Chicago, State of Illinois, wanted some one who lived in Ohio to whom he could transfer the lands involved in suit so that he could institute the suit in the United States Court in the State of Illinois. I paid no consideration for the same. The subject matter of the litigation was for the interest of Walter B. Scates. After the death of Walter B. Scates, sometime in 1886, I reconveyed the same back to the heirs of Walter B. Scates at their request.

FERNANDO B. HANE.

Subscribed and sworn to Sept. 8, 1890.

J. C. HYDE'S AFFIDAVIT.

Affidavit of J. C. Hyde on the following question:

Question. State your age, residence and occupation and if you are acquainted with Fernando B. Hane, one of the above named Complainants in this cause. And, if so, state the circumstances, if you know, and your means of knowledge, of how he became in any way

interested so that his name was used as Complainant to the subject matter in controversy: and further, was he the real party in interest? If not the real party in interest, state if you know, who was the real party and your means of knowledge.

Answer. My name is J. C. Hyde. I am fifty years of age and reside at 334 Sawyer Avenue, in the City of Chicago, State of Illinois; have been a resident of Chicago for the past twenty-six years; I am a real estate agent and broker and have continued in that business for the past twenty years.

I do know one Fernando B. Hane, now living in Bryan, Ohio; he formerly lived at Canton, O., and have known him since October, 1874. I married his wife's sister in 1875, therefore am brother-in-law. The circumstances of his name being used in the above entitled cause is as follows: In the fall of the year of 1883 I made the acquaintance of Judge Walter B. Scates, now deceased, and he stated he had some Wayne county lands to sell and wanted me to sell the same for him. I agreed to act as agent or broker in disposing of the said list of lands he had in Wayne county, Illinois, and in arranging the papers he said he would be obliged to bring suit in the United States Circuit Court against certain parties, and that to do so he would have to convey the land to some good person outside of the state. I suggested my brother-in-law, the said Fernando B. Hane,

then living in Canton, Ohio, and had the deed prepared conveying said lands as so shown as recorded in said deeds. The said Hane did not pay any money or any other consideration for the said lands and was only used for conveyance to allow the said suit to be brought in the United States Court. And I, myself, went to Springfield and paid $100 to the marshal to begin serving the papers and also left the deeds of said lands with the Recorder at Fairfield, Ill., for record there in Wayne county. The sale of the lands was not consummated by me and I abandoned the trial to sell them, when there was so much litigation in regard to them. After Judge Scates' death the said Fernando B. Hane reconveyed said lands to the heirs of Scates, and all the subject matter and interest of said lands were with and in the said Walter B. Scates, the said Fernando B. Hane having no valid interest in them whatever.

JAMES C. HYDE.

Subscribed and sworn to September 6, 1890.

J. LEWIS LEE, Notary Public.

AFFIDAVIT OF LUCINDA A. WALKER.

Lucinda A. Walker testified on taking her deposition as follows:

I am twenty-six years old. My maiden name was Lucinda A. Whitney; my father's name is H. C. Whitney; my mother's name is Sarah A. Whitney. I was married Nov. 24th, 1884; resided in Chicago, Ill., before

and after my marriage, and then went to Revere and have resided there ever since. I am the party named in the suit. Father and mother conveyed to me—can't tell the exact date but think it was in December after my marriage. Did not pay any consideration. It was for love and affection, I suppose. Reconveyed the same land to mother in the fall of 1887. Father sent $5.00 for the cost of deed. That was all the land was worth to me. I was in Revere when father conveyed it to me. Had some conversation with him about it; can't recollect much about it. He said that he had conveyed to me and I was recorded a land owner. Don't know that it was that he could sue in the United States Court in my name. All that I recollect that passed between father and me about it was I received a letter enclosing $5.00 and a deed and asked me to go before a notary public—that he wanted it deeded back to mother as the land was of no value to me. The letter was destroyed. Don't recollect anything else. That was all, that passed between us in relation to the deed; both deeds were made at father's suggestion.

AFFIDAVIT OF SARAH A. WHITNEY.

I am the wife of H. C. Whitney; am 48 years of age and live in Chicago, Ill. I have lived in Chicago thirty-eight years. My husband's occupation is that of a lawyer, his place of business is Ashland Block, Chicago, and he has had his office there for the past fifteen years.

My husband at present is out of business, he being incapacitated for business, June 1, 1888, by insanity. Lucinda A. Walker is my daughter. She was married November 24th, 1884. Is a resident, and moved to Boston at about Christmas of that year. I joined with my husband in a deed Nov. 28th, 1884, conveying to Lucinda A. Walker, our daughter, a large body of land in Wayne county which is now in litigation in this suit. There was no consideration paid. It was a transaction between my husband and my daughter. I do not know whether there was any consideration. The same land was conveyed to me in 1887 by Lucinda A. Walker and her husband. She held the title for two or three years. I do not know what money was paid for the reconveyance but I think there was something. The title to the lands stands in my name to the amount of about 6000 acres, I think. I don't know what the object of my husband's was to have it conveyed to my daughter. Chicago has always been our home for the past fifteen years. My husband's office has always been here and this was our home.

DERIVATIVE CLAIM OF TITLE OF J. B. CORNELL AND J. C. CLOYD.

Stipulation in the matter of J. C. Cloyd and J. B. Cornell acquiring of title.

It is hereby admitted that the title of J. C. Cloyd and J. B. Cornell to the land involved in the above suit

wherein the bills of complaint are filed by Edwin Beecher as their attorney, was derived through the Public Adminstrator of Wayne county, State of Illinois, to pay debts against the estate of Wm. R. Hodges, deceased, which sale was had on the 24th day of January, 1880. That the said Hodges was one of the complainants in the foreclosure suits entitled J. W. Kennicott, et al. v. The County of Wayne. And it is further admitted that the said lands, were a part of his, the said Hodges, proportion to the division under the foreclosure suit.

Signed by EDWIN E. BEECHER,

Attorney for J. C. Cloyd and heirs of J. B. Cornell.

THE VALUE OF SUBJECT MATTER IN CONTROVERSY.)

DEPOSITION OF E. T. HALL,

One of the defendants in the above cause. I am one of the defendants. My age is 52. Have resided at Fairfield, Wayne county, Illinois, for the past 26 years. I purchased 640 acres of land involved in this suit for $500 of J. C. Cloyd, the complainant. The lands were in Sec. ten, Town three south, Range seven east. These lands were worth no more at the time of the commencement of the suit than they were on the date I purchased of J. C. Cloyd. I purchased all of my lands, of J. C. Cloyd that are involved in the suit since the decree was had in the above cause, while the case was pending an appeal in the Supreme Court of the United States.

These lands are,full average,in value of the lands involved in the suit.

R. P. HANNA'S DEPOSITION.

States that he is fifty years old, resides and has resided in Wayne county, Illinois, for the last twenty-five years, and is familiar with the lands involved in the suit. Their value would not exceed from one to two dollars an acre, including improvements. The improvements were put upon the lands by the settlers, and not by the complainants, if any were on these lands.

DENIAL OF THE COURT'S JURISDICTION, BEFORE THE APPEAL.

1st. Defendants denied the Court's jurisdiction in all cases by a general demurrer, and assigned special cause, among which was "that the cause of action, if with any equity, was several and not joint. If, for a reforeclosure, it must be joint, and then all parties in interest should be brought in, and without that,the Court was without jurisdiction."

2nd. That by the answer, page 108, and special pleas in bar with answer, filed page 137 to 245, the Appellants denied the jurisdiction.

3rd. The defendants then in making further answer to the equity of the bill of complaint still denied the jurisdiction of the Court, page 163-8.

4th. The defendants again on petition for rehearing, page 334, expressly denied the jurisdiction of the Court.

That the action was several and not joint.

5th. Defendants again in praying an appeal and severance state as follows, page 351: "Your petitioners show from the record, the action to be the foreclosure of a mortgage in solido for $800,000 with interest at 7 per cent. from April 20th, 1859, for the complainants; or, that this court had no jurisdiction as the amount in value or matter in dispute for each complainant and against each defendant as alleged is less than $500."

The above presents to the Court the defense made to the jurisdiction of the Court in the proceeding of what is termed a "reforeclosure," indicating a former foreclosure had been had.

FURTHER STATEMENT NECESSARY.

That the Court may have directly the facts on which complainants rely to determine the subject matter, whether the action is cognizable in a court of equity with a joint interest against the defendant from a prior foreclosure, of a trust deed and mortgage of the equity of redemption, against the Mt. V. R. R. Co. and the County of Wayne, with decree, sale, and division among the complaints therein, then by mesne conveyances to these complaints; it is necessary to review the original proceedings of foreclosure to determine from the facts alleged in this cause, entitled a "reforeclosure"; how, the present complainaats are, or, can be therewith connected. It is admitted and alleged by the complainant that the defend-

ants. now appellants, herein had purchasedthe irrespective tracts of the County of Wayne and were in possession before any proceedings for foreclosure were commenced against the county, and that they were not made parties; nor, were they bound, by any proceeding or decree therein had.

FACTS OF RECORD.

The foreclosure consisted of three indentures. Set up in the original suit entitled Kennicott, et al. v. The Mt. V. R. R. company and the county of Wayne Reported 16 Wall, 458, suit was instituted March 7, 1865, and thereafter amended Oct. 1, 1866. It sought to foreclose three indentures, executed April 20th, 1859, in *pari materia* conditioned for one object, to-wit: To aid the Mt. V. R. R. company to construct its railroad through Wayne county. First, the county of Wayne executed a trust deed to Isaac Seymore, as trustee, conveying about 103,000 acres of swamp lands to the use of the Mt. V. R. R. Co., providing in the deed that they would more fully to carry out the object of such conveyance, execute a mortgage to the same use and trust (for condition of deed see page 224 printed record of reforeclosure) and here set out for ready reference.

1st. The county granted, bargained, and sold, remised and released, enfeeoffed, convey and confirm * * *

2nd. To secure and guarantee the construction, completion and finishing said road and branches in man-

ner and time and upon conditions in the said act of corporation.

3rd. For the purpose of raising funds from time to time for the construction and completion of said road and branches and the purchase of iron and other material to be used thereon, said company may issue its bonds, countersigned by the said trustee in sums of not less than five hundred or more than one thousand dollars each, at rates of interest not higher than seven per cent. per annum, payable semi-annually, the principal of said bonds payable in the year one thousand eight hundred and seventy-four, at such place as it shall designate. The payment of said bonds shall be secured by a mortgage of the lands, as hereinafter provided, for which said mortgage shall be a prior lien, and shall be referred to and recited in said bonds so to be issued by said company. It being understood and agreed, that the said county shall, and will make, execute and deliver to the said trustees such proper deed, conveyance, declaration of trust, or other assurance as shall from time to time be necessary and proper for the better carrying into effect the true object of this indenture and of securing by mortgage the payment of each and of all said consideration bonds, in manner and form in *such additional instrument* to lawfully and at large set forth and declare, *with the same effect* and certainty as *if the provisions thereof had been embodied* and set forth *in this indenture*.

Two of the county judges did execute an indenture called a mortgage to said trustee, of same date, describing same lands, to secure the payment of the Mt. V. R. R. Co. bonds to be issued by said railroad company.

No equity of redemption was reversed to the County of Wayne but it was expressly saved and given to the Mt. V. R. R. Co. and their assigns, see Page 232 Reforeclosure Record. It provided in case of default of one year's interest, that party of second part may enter * * and having entered and taken full possession may proceed to sell free from redemption so much thereof as shall be * * * "necessary for "the purpose of paying said principal and interest, and "may make such sales of the said premises each and "every of them and all benefit and *equity of redemption* "*of the said parties* of the first part at public auction, and "out of the monies arising from such sale and sales to "retain the principal and interest which shall then be "due on said construction bonds; or, obligation for the "benefit of the holders thereof, together with the costs "and charges of advertisement and sale of the said premises "*rendering the overplus of the purchase money* (if any there shall be), *unto the Mount Vernon Railroad Company, its successors and assigns forever;*" which sale shall forever be a perpetual bar, both at law and in equity, against the said parties of the first part, their successors and assigns. And it is further provided that if

"*after the said construction bonds or obligations shall be* "*fully paid together with all arrears of interest thereon,* "there *shall be any of the above-described lands remaining* "*unsold* or any of the *proceeds and avails of the said lands* "*in the hands of* the *party of the second part* unprovided "for. Then and in that case said *party of the second* "part shall convey *absolutely the said lands,* and shall "pay, transfer, and deliver *said proceeds and avails* to "the said, *The Mount Vernon Railroad Company, its suc-* "*cessors and assigns forever.*

MORTGAGE, MT. V. R. R. CO.

3rd. On the same date, April 20, 1859, the Mt. V. R. R. Co. executed a mortgage to same trustee conveying their franchise and all property of every nature, character and description acquired, or to be acquired to secure the payment of their said bonds and interest, reciting that the payment of the same was primarily secured by mortgage on 103,000 acres of swamp land being even date herewith, executed by the county judges of Wayne county covenanting also to pay all tax to preserve the lien.

Statute Ill., Starr & Curtis, Chapter Revenue, Sec. 52.

"Swamp lands become taxable when county sells, conveys or agees to convey title."

These three instruments were fully set out in the original suit of foreclosure, and are the base for recovery

on which complainants now pray relief, and institute their suit as a proceeding for a reforeclosure of the equity of redemption against Wayne county. When in fact Wayne county had no redemption, as provided by the conditions, and covenants set out in the conveyances. The redemption was expressly given to a third party.

CONSTRUCTION OF THE INDENTURE.

We submit in determining what is the subject matter in controversy. That the three instruments shall be considered as one, and when taken together, conveyed the entire interest of the county. That they are not a trust deed and mortgage merely to secure a debt, but created a trust in which the trustee had active duties to perform, which, when concluded, would place the entire title in third parties, thus leaving no equity of redemption, in the county.

Starr & Curtis, revised statute, State of Ill., Sec. 3, Chap. 30, "Conveyance."

Kirkland v. Cox, 94 Ill., 400. The Court in passing on the above statute of "uses," says: "If legal title becomes vested in Trustee to execute an active trust, nothing short of reconveyance can place title back in grantor, or his heirs, but in certain cases, such reconveyance will be presumed."

Kellogg v. Hale, 108 Ill., 164. "If conveyance imposes on Trustee active duties statute does not pass legal title to beneficiaries."

52 Ill., 454, Henry Co. v. Winnebago Drainage Co.

"After conveyance of swamp lands on condition, if condition is not complied with, it will be deemed to have repudiated, and the court will restore the land to the county."

It was to foreclose the equity of redemption provided for in the three instruments, that the foreclosure suit entitled Kennicott et al. v. The Mt. V. R. R. Co. and the County of Wayne was commenced March 7, 1865, in Circuit Court, U. S. Southern Dist., Ill., and by amendment Oct. 1st, 1866, all three indentures were set up on which to establish the equity and prayer for relief. Cause being heard at June term, 1868, the Court adjudged a decree in favor of the complainants and against the Mt. V. R. R. Co. of a foreclosure for the amount due of the then complainants and decreed a sale of the Mt. V. R. R. Co. property, specifying the franchise and all property or rights of property acquired or to be acquired, or intended to be granted as shown by Ex. H, reforeclosure record, page 269.

The sale was had under said decree, Aug. 28, 1868, and the Mt. V. R. R. Co. became the purchasers, with sale confirmed and deed executed by Master-in-Chancery as shown by said Ex. H-Reforeclosure Record-Page 151. After which, January 17, 1870, the complainants in the original foreclosure proceedings with some forty more persons proceeded by an amended

bill in said proceedings against the county alone, setting up a new base for power, to reach the lands described in the said deed of trust and mortgage, to-wit: A contract by the county with Vanduser, Smith and Company, assigned to the Mt. V. R. R Co., as set out on page 262, and on the hearing the Court dismissed the bill. The cause was appealed to the Supreme Court in cause Kennicott et al. v. County of Wayne, 16 Wall. 454. But the mortgage of the Mt. V. R. R. Co. the decree had June term, 1868, the sale and confirmation and conveyance to the railroad company were omitted from the record. The Supreme Court on the hearing on the partial record so presented, reversed the Circuit Court, and a final decree was rendered June term, 1874, to sell for cash. The sale of the lands was had Sept. 18, 1877, and, by agreement of the complainants, the lands were bid in at three times of the appraised value as a base of division, among the complainants as of their respective holdings, and deeds of conveyance made in May, 1879, after which the present complainants get the respective tracts by mesne conveyance.

ACTION OF PRESENT SUIT AND QUESTION SUBMITTED.

The complainants in the case at bar having acquired deeds of conveyance dereigned, by *mesne* conveyance from the foreclosure of the aforesaid three indenture, decree, and division, now begin this action, January, 1882, called a "reforeclosure" suit, against parties who had purchased

their respective tracts of land from the County of Wayne and were in possession before any suit of foreclosure was commenced, and claim that they by the right, under the law of subrogation through their dereignment of title are entitled to a "reforeclosure" against each Defendant, for his separate tract for the amount of the agreed value of each tract as appraised for a division among the original holders of the bonds. This is the base for equity and of value, for jurisdiction.

While we show that we were not parties, nor bound by the original record of foreclosure, also that by the indenture of Wayne county there was no equity of redemption reserved to the county but was expressly given to the Mt. V. R. R. Co. Also, that Wayne county had repudiated the conveyance so made and held adverse from 1862, as shown by Ex. "I", page 155, Refoeclosure Record order to sell, and Ex. "M", page 278, of lands sold. "If equity of redemption is made to other than the grantor, in the mortgage it is not a mortgage."

Jones on mortgage, Sec. 241.

Description of land and value, as agreed for the division in the original suit of foreclosure and now sought by complainants to be enforced in this the "reforeclosure proceedings," as follows:

Town.	Sec.	Description.	Complainants.	Defendants.	Acrs.	Agr'd Value for a division.
†2 s r 6	11	nw nw	J. C. Cloyd	Heirs of R. White	40	240

†With special pleas.

Town.	Sec.	Description.	Complainants.	Defendants.	Acrs.	Agr'd Value for a division
2 s r 6	11	sw nw	J. C. Cloyd	J. B. Manahan	40	240
1 n r 5	11	e hf sw se	"	F M Burges	20	150
3 s r 7	10	ne ne	"	Wm Shaeffer	40	160
2 n r 9	29	nw sw	"	Samuel Mundy	40	240
"	"	se nw	"	Samuel Sparks	40	240
3 s r 7	10	nw ne	"	E T Hall	40	160
"	"	sw ne	"	"	40	160
"	"	ne nw	"	"	40	160
"	"	se nw	"	"	40	160
"	"	ne sw	"	"	40	160
"	"	nw sw	"	"	40	160
"	"	sw sw	"	"	40	160
"	"	se sw	"	"	40	160
2 s r 6	11	sw sw	"	T F Bain	40	240
*1 s r 5	9	nw nw	"	H T Garrison	40	280
* "	9	sw nw	"	S'm'l Garrison	40	280
1 n r 5	11	w hf sw se	"	E E Slover	20	150
2 n r 9	29	sw se	"	Adam Osterman Wm J Osterman	40	400
2 s r 6	11	se se	C T Austin	M Book	40	240
3 s r 9	10	sw	"	D L McCawley	160	480
2 s 3 9	2	nw nw	"	Wm Morris	40	300
2 n r 9	20	se sw	J B Cornell	J W Hilliard	40	240
2 s r 6	22	ne se	"	N N Borah	40	240
1 s r 5	25	sw sw	"	A F Atteberry	40	340
2 n r 7	22	nw se	"	T J Pettyjohn	40	220
2 n r 9	19	nw se	"	J C Williams	40	220
"	19	sw se	"	R Wilson	40	240
1 s r 5	26	nw se	"	Jno Keen, Jr	40	240
1 n r 9	10	ne nw	"	Susan Phar	40	240
2 n r 9	29	w hf se nw	"	S'm'l Sparks	20	120
1 s r 5	26	ne se	"	H Tompkins	40	240
"	25	nw sw	"	A K Atteberry	40	340
2 n r 9	30	ne ne	"	J F Kline E Beard	40	240
1 s r 5	4	ne se	"	A Martin	40	240

*Decree in State Court.

Town	Sec.	Description.	Complainants.	Defendants.	Acres.	Agr'd Value for a division.
1 s r 5	31	nw sw	J B Cornell	G C Garrod	40	240
1 n r 5	26	se se	"	Geo Warren	40	240
2 n r 9	30	se ne	"	Jas McCleary	40	240
§1 n r 9	23	se sw	"	Wm H Dobbs	40	400
2 s r 6	22	se se	"	N N Borah	40	240
"	23	nw nw	"	"	40	240
2 n r 9	29	nw nw	"	R Wilson	40	240
1 s r 5	31	sw sw	"	G C Garrod	40	240
2 s r 6	23	sw sw	"	N N Borah	40	240
2 n r 9	19	se se	"	J C Williams	40	240
1 s r 5	26	n hf se se	"	H Tompkins	20	120
3 s r 9	1	sw sw	"	D L. McCawley	40	240
2 s r 9	10	ne nw	"	P R Kink	40	240
3 s 3 9	2	nw nw	"	Jas Hutchinson	40	240
"	2	sw nw	"	"	40	240
2 s r 6	19	se sw	H M Alexander	‖ Wm A Dobbs ‖ Aetna Ins Co	40	234
3 s r 7	12	n hf se	L A Walker	H Tucker	80	480
2 s r 6	14	ne ne	H M Alexander	M Book	40	240
"	14	se ne	"	Eliza Smook	40	240
3 s r 6	14	ne ne	L A Walker	A Winters	40	320
2 s r 6	10	ne se	"	Jno Bain	40	440
3 s r 9	7	sw se	Chas A Coe	Jno S Johnson	40	240
1 s r 5	35	se ne	E. H. Taylor	M. Dalton	40	360
"	22	ne se	"	C Peddicord	40	320
3 s r 7	3	e½ se	L A Walker	Wm Shaeffer	80	560
3 s r 9	12	n½	"	D L McCauley	320	1280
"	"	n½ sw	"	"	80	340
1 s r 9	34	ne sw	"	Heirs T St Ledger	40	240
3 s r 7	3	w½ s e	E H Taylor	E T Hall	80	560
2 s r 6	36	n½ ne	"	L J Rider	80	480
1 s r 8	5	w½ nw	Chas A Coe	Lavina Sumter	80	320
1 n r 9	14	sw sw	J S Smith	W Compton	40	260
3 s r 7	12	sw se	E H Taylor	S J Renfro	40	240
3 s r 8	7	w½ se	L A Walker	J K Parmer	80	520

§Disclaimed.

‖Decree pleaded in State Court.

Town.	Sec.	Description.	Complainants.	Defendants.	Acres.	Agr'd Value for a division
2 s r 6	13	ne ne	E H Taylor	J W Atkinson	40	240
"	19	nw se	L A Walker	Wm Garrison	40	360
1 n r 9	26	sw sw	A F Gould	A Bleakley	40	240
*1 s r 5	22	nw nw	E H Taylor	J Skelton J B Bozarth	40	240
3 s r 7	2	nw ss	L A Walker	S J Renfro	40	480
2 n r 7	25	sw se	F B Hane	J W Kindle	40	400
"	36	nw ne	"	E Bonham C A Beecher J C Bestow	40	400 500
1 n r 8	5	se se	"	Geo Johnson	40	
"	7	nw nw	"	Conrad Karn	40	520
*2 s r 5	11	sw se	"	M Sanders	40	320
"	25	ne nw	"	Aetna Ins Co	40	640
2 s r 6	15	sw se	"	Benj Stevens	40	320
"	"	se sw	"	"	40	560
3 s r 7	2	w½ ne	"	J R Murphy	80	422
"	4	nw se	"	L J & A Rider	40	160
"	4	sw se	"	L J Rider	40	160
* "	12	sw nw	"	H Tucker	40	240
1 s r 8	1	se sw	"	J A Boyd W M McRunels	40	320
1 s r 8	5	nw sw	"	Lavina Sumter	40	280
"	5	sw sw	"	R D Adams	40	240
"	8	e½ ne nw	"	Allen Cope	20	200
"	8	w½ ne nw	"	Wm Robertson	20	200
"	13	nw sw	"	V C Borah	40	560
* "	24	ne sw	"	Wm N Borah	40	600
*3 s r 8	6	ne nw	"	Mariah Harlan R H Puckett	40	621
"	6	sw sw	"	Geo F Pyket	40	1600
"	6	sw nw	"	E W Pendleton	40	670
"	7	ne sw	"	Jas K Parmer	40	989
* "	7	w½ nw	"	H Tucker	80	2800
"	17	ne nw	"	Wm A Atteberry	40	480
"	17	nw nw	"	Thos Behymer	40	420

*Decree in State Court.

Town.	Sec.	Description.	Complainants.	Defendants.	Acrs.	Agr'd Value for a division.
3 s r 8	17	sw nw	F B Hane	Henry Kencart Wm White	40	420
"	17	sw sw	"	Wm Smith	40	240
1 s r 9	6	w½ se	"	Van R Price	80	1360
"	21	sw nw	"	A Wall R Campbell	40	320
"	21	e½ nw	"	S M Hill	80	640
"	28	sw nw	"	"	40	140
2 s r 6	1	ne ne	"	L E Skinner	40	604
"	30	se sw	"	J L Waggoner	40	505
3 s r 9	8	ne sw	"	John Hafflele	40	400
"	8	sw sw	"	Thos Clark	40	320
"	15	nw	"	John Odell	40	960
"	18	w½ ne	"	John Johnson	80	840
1 n r 7	1	e½ se	"	Geo Johson	80	600
"	1	sw se	"	Wm Carson G J George	40	240
"	35	sw ne	"	O P Murphy	40	320
2 n r 9	23	sw se	"	Aetna Ins Co	40	480
"	21	sw sw	"	G J George R D Adams	40	480
"	21	se sw	"	Wm Rhodes	40	320
"	23	se ne	"	J C Weaver	40	240
1 s r 5	5	nw se	F B Hane	Wm M Branson	40	320
2 s r 5	2	nw ne	"	J W Anderson	40	400
"	11	sw sw	"	M Sanders	40	140
"	12	ne nw	"	A W Bruce	40	400
[2]2 s r 6	27	sw ne	"	M M Wheeler	40	400
[2]3 s r 6	4	nw se	"	Wm Mabry	40	240
"	4	sw se	"	Geo W Draper	40	240
1 s r 8	3	ne se	"	C A Beecher	40	240
1 s r 9	13	ne sw	"	John Harper	40	560
"	29	se	"	F W Tracey	160	960
3 s r 9	3	e hf nw	"	M Poole	80	454
"	3	sw nw	"	J Hunsinger	40	227
"	9	se ne	"	Geo W Odell	40	240
"	9	nw ne	"	M Poole	40	240
"	9	sw ne	"	M Cravens	40	240
"	11	ne	"	D L McCawley	160	960
"	14	s hf ne	"	John Funkhouser	80	800

[1]Suit in State Court.
[2]Decree in State Court.

The above shows the value, that each bondholder placed on their respective tracts at the division in the original foreclosure. We show the value would not exceed from one to two dollars per acre. When bondholders receive their distributive share, their interest is ended.

Ex-part B. & O. R. R. Co. 106, U. S. 6. Farmers L. & T. Co. v. Waterman Ib. 266. Russell v. Strurell 105 U. S. 303. Chalfield v. Boyle 105 U. S. 230. Hassell v. Wiley 105 U. S. 597. Paving Co. v. Mulford 100 U. S. 147.

In this manner the defendants have preserved in the record a denial of the jurisdiction of the Court of the parties and subject matter at every step.

As the Court below doubted its power, and refused to modify, set aside the decree, or dismiss the suit, for want of jurisdiction on motion at this stage, after the former judge presiding had held that the action was joint, and an appeal had been had, with dismissal and remanded order for want of jurisdiction amount, the cause is now certified to this court under act, March 3, 1890, with the record and motion renewed as preserved to dismiss the suit for want of jurisdiction, and submit to the Court whether on the statement of facts, with motion renewed to dismiss the suit for want of jurisdiction the Court has the power over the record and causes, with the depositions taken herein, to consider the motion so renewed.

and if so, based on the record and facts; is, the cause yet in *fieri*: and, is it the duty of the Court to modify, or, set aside the decree; or, dismiss the suit; for want of jurisdiction?

AUTHORITIES.

Is the cause yet in *fieri*? We refer to the case of Harris v. Hardeman, 14 How 334-348. Motion is the proper remedy when the proceedings are in *fieri*.

Shepard v. Cane, 1 Abb. C. C. 207.

Gray v. Lattimore, 2 Abb. C. C. 242.

If want of jurisdiction appears, it is the duty of the court at any stage of the proceedings even after execution issues, to dismiss. The Court has jurisdiction to set aside a former decree for being fraudulently obtained.

36 F Reports, 627.

If record declares a controversy of which the Court should not take cognizance, it should dismiss; if not, the Supreme Court will correct on motion.

Morris v. Gilmer, 129 U. S., 315.

The United States court will take notice of want of jurisdiction, although the point was not formerly raised in the Circuit or Supreme Court.

Graves v. Corbin, 132 U. S., 571-590.

Remanding cause without special direction, parties may amend and make new issues.

Chickering v. Fails, 29 Ill., 294.

Buck v. Hamilton, 99 Ill., 507.

Blackford v. Newbery, 100 Ill., 484.

To vacate at subsequent term.

Hubbard v. Miller, 86 Ill., 258.

Renewal of motion after appeal.

Butler v. Michell, 17 Wis., 32.

The record must show affirmatively every fact necessary to give jurisdiction.

Barr v. Preston, 111 U. S., 255.

AFTER AN APPEAL.

Whether the want of jurisdiction could be taken advantage of after an appeal had been had and the Supreme Court had passed on the *merits* of the case was decided in case of Skillins Ex. v. May Ex., 6 Crunch, 267.

The Court states: "It appearing that the *merits of the case* had been fully decided * * and its mandate directed only the execution of its decree, it is the opinion of the Court that this Court is bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings." In that case the Court had passed on the merits. "If in the course of trial the lack of proper parties is made to appear the Court may order of its own motion on inquiring of citizenship, give either party an opportunity to be heard on the question."

Williams v. Notaway, 104 U. S., 211.

Hasting v. Mowery, 116 U. S., 588.

If we concede that the causes are yet in *fieri*, on being redocketed under the mandate of the Supreme Court to proceed, as the law obtains, has the Court now, under the act of 1875 and March 3, 1890, the power to consider and adjudicate on the question of jurisdiction preserved throughout in the record of the proceedings? If so, then the causes of Fernando B. Hane, Lucinda Walker and J. C. Cloyd's second bill of complaint should be dismissed. By their own sworn statement, they say that they were but the nominal parties to give jurisdiction.

The allegations, in their bill of complaints, show why the parties were improperly and collusively made. Walter B. Scates and Henry C. Whitney, who were citizens of Illinois and made the conveyances without consideration, now appear as attorneys for the grantees and state for the complainants and allege that the state court, had found and decreed, on a square issue, in a hundred and more cases in action to remove cloud from title, against the said Scates and Whitney, before the said conveyances were made to the nominal complainants. That the said state courts had decreed said trust deed and mortgage of Wayne county were null and void.

Further, that the supreme court of Illinois had adjudged in a test case, Scates v. King, 110 Ill., 454, and Cloyd v. Trotter, 115 Ill., ——, that the said foreclosure suit of the trust deed and mortgage of Wayne county, 16 Wall. 456, supra, having been commenced

after the county of Wayne had sold all lands to Defendants herein and others, and they not being made parties thereto were not bound by the evidence nor decree therein had. See F. B. Hane's, Bill of Complaint, page 57. Lucinda A. Walker 132, J. C. Cloyd 122 (printed record, reforeclosure suit). On these allegations they prayed an injunction and restraining order against some of these defendants and others from prosecuting suits in the state courts. Injunction granted April 11, 1885, when, on motion before Hon. Walter Q. Gresham, the same was dismissed, page 169, the Court holding that when the state court had first acquired jurisdiction that the United States court would not interfere.

We submit that these causes should be dismissed with cost as the complainants were but nominal, simulated and collusive, and created for the sole purpose of impowering an apparent but fraudulent jurisdiction.

Harris v. Oakland, 104 U. S., 450.

Farmington v. Pillsbury, 114 U. S., 138, 139, 145.

Detrich v. Dean, 106 U. S., 537, 541.

Little v. Giles, 118 U. S., 596, 603.

Also late case filed during the present term of this court, Dec. 16, 1895, The Lehigh Mining and Mfg. Co. v. J. J. Kelly, et al.

As to all other causes, that of Chas. Coe, J. Sargent Smith, Arthur Gould, H. M. Alexander and E. H. Taylor, as well as the causes of F. B. Hane, Lucinda A.

Walker and J. C. Cloyd's second bill of complaint for collusion, no amount in value is alleged as the subject matter in dispute. Neither does it appear of record as against each defendant. While the fact appears by E. T. Hall's deposition that J. C. Cloyd sold and conveyed to said Hall, after the decree was had, 640 acres valued by the division at $2580, of which 320 acres were in suit, and for the 640 acres he paid the sum of $500. This value is sustained by the evidence of R. P. Hanna and not questioned nor denied. See their evidence, *supra*. This value runs through all causes, so that, as against any defendant, the court would not have jurisdiction.

It is shown by the record that the defendants have at every step denied any joint liability with other defendants, and insisted that the subject matter as set up was ambiguous. That complainants had no equity by which they could be subrogated to any right, as being purchasers of purchasers at a judicial sale, even if there was an equity of redemption to have been foreclosed against the county of Wayne. But there being no equity of redemption reserved to the county and the county having repudiated the relation created by the indentures, the only action that the complainants could institute against the defendants would be ejectment on their claim of title.

Each defendant has insisted for himself from the outset that his title is adverse—that they were not purchasers of an equity of redemption, but that their holding

against the so-called trust deed and mortgage was based on the adverve holding of the County of Wayne, under the orders Ex I of the county court, March term, 1862. *Supra*, and on an open declaration of the forfeiture after the consideration for an extension of time, given to Vanduzer, Smith & Co., and their assigns, page —, original record, was forfeited by order Ex. I, ordering the land commissioner to proceed and sell all lands, and of the lands sold as shown by Ex. M, pages 278-312, original record.

That by the action of the county, a repudiation and open declaration was made of the previous existing relations, and an assertion of an appropriation, by the county to itself accompanied, by an actual exclusive dominion over the land as no condition nor covenant had been kept by the parties. It was this title, from the county, an adverse holding as against any right of Complainants, that each Defendant has made his defense.

The Court in case of Scates v. King *supra* says that the proceedings to foreclose the said mortgage in Kennicutt suit could have no effect on the rights of King nor be of any force for the Complainants, except it was to be used to keep up the chain of title for ejectment.

Dunlap v. Wilson, 32 Ill., 517.

Ohlong v. Sutgers, 32 Ill., 23.

Maher v. Lantron, 86 Ill., 513.

The defense of the defendants and now ap-

pellees may be placed on the same footing as Mrs. V. Tupper et al., 110 U. S., 398, where each defendant claimed a distinct interest—(Referring to 106 U. S. three causes.)

With this presentation of the case, we submit that neither the jurisdiction over the parties nor the subject matter can be sustained.

That the redocketing of the cause on mandate from the supreme court left all question of jurisdiction open for review and that the proper practise was by motion as long as the cause were in *fieri*.

That the evidence clearly shows a fraudulent transfer to create an apparent jurisdiction. That the appellants' interest is each distinct, and separate from each other, and so asserted throughout the proceedings, and since they purchased their respective lands, from the county, and was that of adverse holding against the indentures denominated, but not a mortgage.

That the court below had the power to consider the question of jurisdiction and that on the record and evidence it was its duty to dismiss the cause with costs to the appellees.

All of which is respectfully submitted.

H. TOMPKINS, Att'y for Motion

[No. 235.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

M. M. WHEELER, et al.,
v.
J. C. CLOYD, et al.,

Appeal Certified by the Circuit Court, Southern District Illinois.

REPLY BRIEF OF APPELLANTS.

H. TOMPKINS, Attorney for Appellants.

PRESS STEAM PRINTING HOUSE, FAIRFIELD

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REPLY BRIEF OF APPELLANTS.

The error of appellee's brief by E. Beecher in the position taken would seem to call for, a reply, a further statement. Appellee assumes that this is an original appeal, whereas it is a certified case arising out of the condition in which the case stood on being redocketed under the mandate of this court, and an intervening statute giving a further remedy by the provision of act of congress of February, 1889, and March 3, 1891, giving power to the circuit court, where the question of jurisdiction is at issue, to certify the same to the supreme court,

on that question alone. And being so certified it brings the whole record before the court as appealed in 1886. The same cause, with an intervening statute, while the cause is pending before the court; thus giving a new remedy, for proceedings to be certified up.

2nd Abbott, U. S., Practice 236.

The cause was before this court on appeal in 1886 by a supercedeas bond of $5,000 where the court held below that the action was a joint action, and on that holding, granted the appeal of the jointly consolidated cases. The bond, so given, is still in force. No steps have been taken on the mandate except what appears in the record as now certified to the court involving the question of jurisdiction.

It is true, as appellee states, that there were eleven separate causes which were consolidated, not that they had a joint interest, but, that the facts and evidence in the one was applicable to each and all of the complaints. The appellee, now, not by motion, but after joining issue on error assigned, object that no bond was filed. "The giving of a bond is merely directory and the presumption of law is that it is complied with."

1st Wheaton, 304, Masten v. Hunter.

As the court certified the appeal, it must be conceded a sufficient compliance with the order of the court. Besides, "it is too late to raise the question of a sufficient compliance with the order of the court in taking the

appeal, after joining in error."

40 Ill., Backman v. Allund, 128.

"On motion to dismiss for want of bond, the motion could be defeated by an offer to give bond."

23 Howard, 1, Anson v. Blue Ridge R. R. Co.

2d. Appellee object, that the cause had been fully disposed of by the court. This, we concede, would be a valid objection to the court certifying the cause on the issue of jurisdiction alone to this court, had the court on the original appeal rendered a decision on the merits, but this was not done.

But otherwise, the original appeal was granted, as the court held, that the action was a joint action, against the position of the appellant, taken throughout the whole proceeding to the contrary. Yet the appeal was necessary for appellant to get the question before the court, whether it was a joint action, if so, to have the cause tried on the merits. But the appeal was dismissed for want of jurisdiction, while the act of congress February, 1889, and March 3, 1891, intervened and give the remedy while the cause was still before the court to make the issue of want of jurisdiction.

The taking of the appeal suspended, any further action, of the circuit court until the mandate of this court was filed and cause redocketed. No time intervened as of the term from which the appeal was taken and the filing of the mandate and redocketing the cause.

The authorities referred to in appellee's brief to show that the motion renewed, on filing and redocketing the cause, do not meet the situation of the case at bar. There was no question raised by the motion, plea and answer to the jurisdiction, with an appeal and renewal after mandate and redocketing, but they refer to a motion to be heard in the same court at a subsequent term.

Appellees object that the affidavit of F. B. Hane and J. C. Hyde as affidavits. F. B. Hane being one of the complainants in the consolidated cases and filed a separate complaint, and J. C. Hyde being his brother-in-law and having an interest in making the arrangement with Walter B. Scates, for the conveyance, to Hane being sustained by the declaration in the deed of the Scates heirs to their mother, on page 9 reciting that F. B. Hane had the naked title, while they were the beneficiaries, and the deposition taken on notice of Letitia Scates and Chas. Scates, the last named who testifies "that he took it for granted that the conveyances were to Hane and Cloyd for the purpose of bringing suit in the United States court," (page 25) is sufficient proof of a fraudulent conveyance for the purpose of making an apparent jurisdiction for the United States court. They make no denial. The same fact appears by deposition taken of Lucinda A. Walker and Sarah A. Whitney, as to cases of Lucinda A. Walker.

All other cases depend upon the subject matter, of

the suit, as stated in the original briefs, that there could be no foreclosure against the County of Wayne; nor a reforeclosure against the defendants, with the fact that no complainant has as against each defendant the amount in value to give the court jurisdiction. Beside, each defendant has no interest jointly with any other defendant. The defense is adverse to the complaint and distinct from other defendants. This position was taken throughout the original proceedings and now repeated.

Appellee objects that the case was off the docket fifteen months. There is no evidence to show such a state; if so, the appellee would have no decree to enforce. By practice in trial courts, causes are often held under advisement, and when decided the ruling and order is entered as of the date of the hearing.

The court having certified the cause as being on the docket there is nothing to base the statement that it was off the docket. It necessarilly took time to get depositions taken in Massachusetts, Illinois, Ohio and Chicago. The nominal complainants were hard to find.

It is objected by appellee as the consolidated causes were entitled Wheeler et al v. Cloyd et al, and made up of eleven distinct causes; that the allegation in the record attempts to bring all parties before the court, while fraud is only charged against a part of the complainants. But the records show that the same question was raised against the jurisdiction of the court and

against all, in the consolidated causes, and the consolidated causes being before the court, it is not necessary to repeat all in this record to sustain the question arising on the present issue, the court already has the matter before it. It is the same cause of action and record.

The court has certified for the decision of this court, the issue. Has the court the power to enforce the decree, under the law of the United States? Has the court jurisdiction of the subject matter as shown by the record and evidence? This involves the looking into the whole record as to the subject matter put at issue by complainant's allegation of facts and the relief prayed, as well as the charge of fraud in making a cause for apparent jurisdiction.

Appellee should not complain that the certified cause included all, as the consolidation was had on their motion and has by such title, so been carred, on the docket through all of the proceedings, with a joint supercedeas bond of $5,000 in taking the appeal. "The courts say that they hold themselves bound to take notice of any objection to their jurisdiction whenever it may occur and however it may be presented and without the consent of the parties."

Rhode Island v. Mass., 12 Peters, 718.

The non-compliance with formalities, that would be merely directory are not to interfere with the determina-

tion of the question of jurisdiction, so that the court can see that the subject matter at issue and parties to the record is an invasion of its jurisdiction, and when brought before it, they will decree a dismissal.

Appellees object to the record, "that the certificate of the Clerk does not show that the affidavits contained in the record were the only evidence heard by the Court."

The clerk certificate states "That the record contains a full and complete copy of the mandate and filing and proceedings had therein, thereafter had, together with evidence thereinafter filed in * * * consolidated causes" * * *.

This, we submit, makes a complete record, until some specified matter is shown to have been omitted.

Appellee objects, That that the same matter was set up by Appellants when the question was before the Court as reported in 137 U. S., page 537, on pages 163 and 167. This is, in fact, our position that we did raise, the question and issue of want of jurisdiction, by demurrer, pleas, answers and motion, which appears by the record, in which the motion was filed and now brought before this court, on the mandate from this court being filed and cause re-docketed, the question we are submitting.

The Circuit court could have dismissed for want of jurisdiction under act of 1875, but, Appellants had no redress or remedy when the decision was adverse to them, unless the action was joint and the Appellants

had the jurisdictional amount for an appeal. This remedy the Appellants invoked, but were defeated.

But, a statute being enacted intervening the pendency the suit, giving the Court the power to certify a cause where the question of jurisdiction is at issue without regard to the amount of value in controversy, gives a new remedy to the Appellants to be heard by this Court.

With this reply to Appellees' position, which seems to be but technical and evasive of the substantial objection, to the jurisdiction which Appellants present to the Court.

All of which is respectfully submitted,

H. TOMPKINS.

Attorney for Appellants.